Supreme Court, U.S.
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CASE NO. 92-1370

IN THE SUPREME COURT OF THE UNITED STATES

October 1992 Term

In re:

BFP, A Partnership,

Debtor.

BFP, A Partnership,

Petitioner and Plaintiff

vs.

IMPERIAL SAVINGS & LOAN ASSOCIATION; PAUL OSBORNE; WILLIAM LITTLE; DENNIS ROY; ARTHUR RITZ; JOSE CRUZ; RICHARD MARCZ,

Respondents and Defendant

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

PETITIONER'S BRIEF IN REPLY TO BRIEFS OF RESPONDENTS

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PETITIONER'S BRIEF IN REPLY TO BRIEFS OF RESPONDENTS

Petitioner BFP responds to the briefs of Respondents as follows:

To comply with length limitations of Rule 15, the following words are used to mean the following herein:

Osborne: All individual respondents.

Resale: The sale by Osborne.

Foreclosure: Where, appropriate, the sale (transfer) sought to be avoided.

STATEMENT OF THE CASE

Osborne claims that evidence was taken (Br. p. 15). There was no evidentiary hearing. The court dismissed for failure to state a claim upon which relief could be granted (Pet.Cert. App. pp. 28-31).

Osborne refers to the prior involuntary proceeding (Osborne's Br. p. 2) filed December 31, 1988 in which Petitioner was not adjudicated bankrupt and which was dismissed prior to the July 12, 1989 foreclosure sale (Osborne's Br. p. 2-3). Its only relevance is the lack of

notice to Petitioner of proceedings by Imperial; the latter did not send copies of pleadings to the address shown on BFP's pleadings.

Osborne states that the surplus of the bid over the amount owing on the note secured by the first trust deed was made available to the junior trust deed holder. Such does not appear in the record.[1] This contention, made for the first time in the opposition to certiorari, should not be considered.

Although notice required by California law was given, BFP alleged lack of notice of continuances and that Imperial promised notice (Appendix, para. 26 of the Complaint, p.20). These facts strengthen BFP's position under the cases which consider circumstances of the sale

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1. The record does not show what happened to the surplus. Imperial's agents have not properly disbursed or accounted for the funds.

in addition to inadequacy of consideration in determining the applicability of 11 U.S.C. 548(a)(2). A copy of the Complaint is in the Appendix hereto.

REASONS FOR GRANTING THE WRIT

I. THE WRIT IS NOT A DRASTIC REMEDY TO BE AVOIDED

(OSBORNE'S BR. P. 5 TO THE CONTRARY)

Osborne contends that certiorari is a drastic remedy. He cites In re Woods, 143 U.S. 202, 206, 12 S.Ct. 417, 36 L.Ed. 125 (1892) where this Supreme Court declined to grant on certiorari to review a decision on state law and Forsyth v. Hammond, 166 U.S. 506, 513-515, 17 S.Ct. 665, 41 L.Ed. 1095 (1897) on certiorari before final judgment saying, even so, conflict of circuits is a basis (p. 515). Certiorari (28 U.S.C. Section 1254) is a discretionary writ which takes the place of appeals. Conflict of Courts of Appeal

decisions is a ground for granting the writ: Rule 10.1(a), Supreme Court Rules; Dewsnup v. Timm, ___ U.S. ___, 112 S.Ct. 773, 776, 116 L.Ed.2d 903 (1992); Buffalo Forge Co. v. United Steel Workers of America, 428 U.S. 397, 404, 19 L.Ed.2d 1022, 1028, 96 S.Ct. 3141 (1976); as are other grounds mentioned in Rule 10.1(c).

II. THE PETITION IS NOT MOOT

(OSBORNE'S BR. P. 6 TO CONTRARY)

Osborne contends that the resale of the property makes the case moot (p. 7). On July 12, 1989, the foreclosure sale occurred. On November 24, 1989, the adversary complaint (App. hereto) to avoid that foreclosure sale was filed. The resale was on January 31, 1990. Osborne's Motion to Dismiss was heard on February 6, 1990. No evidence of the

resale appears in the record.[2]

Relief other than restoration of the property is available. 11 U.S.C. Section 550(a) provides that property or its value may be recovered; In re Lindsay, 98 B.R. 983, 992-3, (Bkrtcy. S.D. Cal. 1989), In re Coleman, 21 B.R. 832, 836-7 and In re Nance, 26 B.R. 105 (Bkrtcy. S.D. Ohio 1982) so held.

In some of the cases cited by Respondent Osborne, court authorization was needed to enter into a transaction, was

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2. Also not in the record: On November 30, 1989, as Instrument No. 89-651420, a lis pendens of the adversary complaint to avoid the foreclosure sale was duly recorded in the County of Orange. Prior to the filing of the adversary complaint, Petitioner BFP and Respondent Osborne discussed releasing a lis pendens of a state court action and holding the proceeds of sale. BFP suggested that the proposed written agreement refer to the lis pendens of this case. The proposed agreement was not signed. Did a title company miss the lis pendens or did the buyers assume the risk?

given and the transaction took place. The appeal would not undo the acts done pursuant to the court order involving persons not parties. For instance, in Valley Nat. Bank of Ariz. v Trustee, 609 F.2d 1274, 1283 (9th Cir. 1979) the court specifically said that the merger had taken place and

> "...persons who were affected by that transaction are not subject to the jurisdiction of either this court or the reorganization court. ... All of these facts make it difficult, if not impossible, to fashion an equitable remedy. ..."

In this case, as stated above, relief can be granted without affecting the buyers on the resale. Furthermore, petitioner alleged fictitious defendants acquired an interest in the property (pp. 1 and 3 of Appendix hereto).

In re Coleman, cited above, it was held that failure to keep the automatic stay (11 U.S.C. Section 362) in effect did not bar relief. In this case, judgment for the value or sales price less cost to Osborne is the proper remedy.

III. THERE IS A REAL CONFLICT BETWEEN THE CIRCUIT COURT OPINIONS

(OSBORNE BR. P.8)

Durrett v. Washington National Insurance Co., 621 F.2d 201 (5th Cir. 1980) was decided under the Bankruptcy Act, Section 67(d) which provided that transfers "without fair consideration" are fraudulent and null and void and consideration given is "fair (1) when in good faith, in exchange and as a fair equivalent therefor property is transferred. . . ." In Littleton, 888 F.2d

90, 92 fn.5 (11th Cir. 1989), the court said that said Section 67(d) of the Act was the forerunner of Section 548(a) of the Code and courts have applied the reasoning of Durrett to cases under said Section 548(a).

Osborne contends that Durrett has been characterized as dictum (Osborne Br. p. 8). The Circuit Court said "Upon remand, the District Court shall enter judgment for plaintiff-appellant directing the rescission of the transfer under Section 67(d) of the Act." It is clear holding, not dictum.

The very cases cited by Osborne say that Durrett "held" that a foreclosure sale could be avoided for inadequacy of price. The language regarding dictum was with respect to the innuendo that the 70% rule would govern whether or not the consideration was of reasonably equivalent value. Osborne cites:

A. Federal Deposit Insurance Corp. v. Blanton, 918 F.2d 524, 532, fn. 7 (5th Cir. 1990). The court said of Durrett:

> "...the Fifth Circuit held that ... (a) foreclosure sale... the transfer was fraudulent under Bankruptcy Act 67(d)."

and that courts have applied the reasoning of Durrett (on Bankruptcy Act 67(d)) to cases under said Section 548(a).

B. In re Littleton, 888 F.2d 90, 92, reasonably equivalent value was found because extinction of junior liens benefited the Debtor and the liens exceeded the value of the property so that Debtor had no equity. The court said:

> "in Durrett, the 5th Circuit held that a...foreclosure sale... was fraudulent under Bankruptcy Act Section 67(d)." (Emphasis added)

C. In the Matter of Grissom, 955 F. 1440, 1449 (11th Cir. 1992) the court

referred to "dictum" (p. 1446, in the paragraph beginning on prior page) as to the 70% rule only and said:

> "...The Bankruptcy Court clearly revealed its intention to abide by the 70% dictum of Durrett" (page 1448).

The court said that "Durrett's 70% test should only be used as a guideline (p. 1445) with other factors discussed at pages 1446 and 1448. The court remanded the case for consideration of the factors.

Twice on page 9, Osborne contends that Durrett is no longer the law and/or is not entirely valid, citing the foregoing three cases and Sandoz v. Bennett (In re Emerald Oil Co.), 807 F.2d 1234, 1238, fn. 6, (5th Cir. 1987). In that footnote it said that Durrett is still the law of that circuit. Sandoz said In re Madrid, 725 F.2d 1197 (9th Cir. 1984) criticized

Durrett. However, that Madrid decision was that there was no transfer and it did not discuss lack of reasonably equivalent value. Congress promptly made it doubly clear that a foreclosure is a transfer as held in In re Ehring, 906 F.2d 184 (9th Cir. 990). In Abramson v. Lakewood Bank & Trust Co., 647 F.2d 547 (5th Cir. 1981) the criticism of Durrett also was only in the dissent.

Respondent Osborne contends that Grissom did not disagree with the decision sought to be reviewed. The 9th Circuit Court holds that there is an irrebuttable presumption that the bid is the reasonably equivalent value. Osborne's quote from p. 1446 of Grissom concerns a rebuttable presumption, and the Grissom court said at page 1447 that:

> "...it is inappropriate to make either the achievement of a fixed percentage of value or compliance

> with the state foreclosure law the decisive factor.

Osborne contends at page 11 that in Barrett v. Commonwealth Savings Ass'n., 939 F.2d 20 (3rd Cir. 1991) the parties had stipulated at the trial that the value would be interpreted pursuant to Matter of Bundles. Not so. There, the court said that on the appeal, the parties agree that the Bundles standard should be used. Barrett specifically discussed factors to be considered in determining whether the reasonably equivalent value was given!

At page 11, Osborne quoted the following part of Barrett not underscored and omitted the portion underscored:

> "[r]elief from foreclosure should be reserved for extraordinary situations where the state law or sheriff's office procedures have not been followed,

where advertising is extremely limited, or . . ."

In making the decision sought herein to be reviewed, the court did not go into any factors which might determine whether or not there was reasonably equivalent value.[3]

On Respondent's Motion to Dismiss, the allegations in the complaint that the property was worth $725,000.00 and that the sale was for less than reasonably equivalent value (Appendix hereto, para. 28, p.20) are to be taken as true; dismissal is proper only if under no theory could plaintiff be entitled to relief, as held in Kelson v. Springfield, 767 F.2d 651, (9th Cir. 1980). This Honorable

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3. Had the case gone to trial, evidence would have shown that the sale was noticed for December 1988, postponed six times to July 12, 1989 without any additional advertising and without giving notice to BFP or the second trust deed holder.

Court stated on a Motion for Judgment on the Pleadings, "allegations are accepted", Conley v. Gibson, 355 U.S. 41, 45-46, 78 S.Ct. 99, 102, 2 L.Ed. 2d 80 (1957).

The Bankruptcy Court stated that the controlling decisions were (1) In re Madrid, 21 B.R. 424 (9th Cir. BAP 1982) (which held the consideration received at the foreclosure sale is reasonably equivalent value) and (2) In re Ehring, 91 B.R. 897, (9th Cir. BAP 1988) which held there was no transfer). On appeal of the latter it was held that a foreclosure is a transfer, In re Ehring, 900 F.2d 184 (9th Cir. 1990).

Respondent Osborne states that in the last fifteen years Congress has not amended reasonably equivalent value. In re Madrid, 725 F.2d 1197 (9th Cir. 1984) did not discuss whether the foreclosure establishes the reasonably equivalent value but held that the foreclosure

BEST AVAILABLE COPY

did not constitute a transfer. Congress promptly amended the definition of transfer in 11 U.S.C. Section 101 to include transfer of an equity of redemption and Section 548 to include "involuntary " transfers.

Respondent Osborne contends that amendments to federal statutes are written in view of existing laws, citing Dewsnup v. Timm, ___ U.S. ___, 112 S.Ct. 773, 779, 116 L.Ed.2d 903 (1992) where this court was reluctant to interpret the Bankruptcy Code to effect a major change not the subject of discussion in legislative history. Yet elsewhere Respondent Osborne argues Durrett does not apply because it was decided under the Bankruptcy Act not the Code.

IV. MISCELLANEOUS MATTERS OSBORNE DISCUSSES (OSBORNE'S BR. P. 18-24)

It is argued that Debtor lost no

equity (p.2) because $421,815.75 was owed on the first trust deed and $200,000.00 on the second. However BFP alleged that the value was $725,000.00 (Appendix hereto, para.28, p. 20). Therefore, there was an equity.

Osborne alleges that BFP benefited by extinction of a junior trust deed. Since BFP lost the property, extinguishing a lien absent extinguishment of the debt was no benefit. To the extent that the junior lien was for hard money advanced, Debtor is still liable on it.

The inadequacy of the price alone is of no concern in the state courts. However, 11 U.S.C. Section 548 provides that a transfer can be avoided if Debtor received less than the reasonably equivalent value.

Osborne cites the Winshall Settlor's Trust, 758 F 2d 1136 (6th Cir. 1985). It is the only Circuit Court case which has

agreed with the 9th Circuit. Five circuits are contrary and the decision in Winshall was decided on facts that occurred before the 1984 amendments.

Osborne refers to the dissent in Abramson v. Lakewood Bank & Title Company, 647 F.2d 547, 549 (5th Cir. 1981) which conceded that the court was bound by Durrett although he thought the foreclosure is no transfer (as held by the 9th Circuit Court in Madrid and overruled by Congress in 1984).

Butner v. United States, 440 U.S. 48, 59 L.Ed.2d 136, 99 S.Ct. 914 is inapplicable. In Butner the Court of Appeals had decided that under state law, the mortgagor was entitled to the rents. This court granted certiorari to determine whether or not a federal equitable principle or the state law governed. At 440 U. S. at 54-55, this court said that property interests are created and de-

fined by state law unless Congress exercised its power to fashion a contrary rule.

By contrast, in Section 548(a)(2), Congress states that a transfer for less than a reasonably equivalent value can be avoided.

V. CONCLUSION

Counsel for BFP asked the clerk if additional time in which to analyze and comment on cases cited by Respondent Osborne could be granted and was told not possible; we reply only to the more important new matters and errors.

Notwithstanding inaccuracies in Respondent Osborne's brief which may justify sanctions, past performance shows that, if certiorari is granted, helpful and competent briefs will be before the court from him and the Solicitor General.

Petitioner asks that the Writ be

granted to resolve conflicts between circuits on whether or not a mortgage foreclosure can be set aside under 11 U.S.C. Section 548, to settle that important question of law and to correct the conflict on statutory interpretation with this courts' decisions.

BFP did not brief the merits fully and so requests that the court not make a summary determination under Rule 16 adverse to BFP.

Dated: May 6, 1993.

RESPECTFULLY SUBMITTED,

ROY B. WOOLSEY
Attorney for Petitioner

D113:BFPSC.P90

APPENDIX

COPY OF COMPLAINT TO BE REVIEWED
FILED NOV 24 P 1:34
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PAID
SUMMONS ISSUED: 27 NOV 1989
ANSWER: 27 DEC 1989
STATUS CONFERENCE
DATE: 2 FEB 1990 AT 11:00 A.M.

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UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

In re: BFP, a Partnership, Debtor.	No. SA 89-06771-JR Chapter 11 Adv.No. SA-89-0977-JR
BFP, a Partnership, Plaintiff, vs. IMPERIAL SAVINGS & LOAN ASSOCIATION, a California corporation; PAUL OSBORNE WILLIAM LITTLE; DENNIS ROY; ARTHUR RITZ; JOSE CRUZ; RICHARD MARCY, and DOES 1 to 10, inclusive, Defendants.	COMPLAINT TO DECLARE TRANSFER OF REAL PROPERTY NULL AND VOID, AND TO VACATE AND SET ASIDE TRUSTEE'S DEED OF TRUST, AND FOR DAMAGES

Plaintiff alleges that:

1. This adversary proceeding is brought pursuant to Section 548(a)(2)(A) and (B)(i) and the jurisdiction of this Court is based upon 28 U.S.C. 1334(b) and Title 11, United States Code. This is a "core" proceeding under 28 U.S.C. 157(b)(2)(F).

2. At all times herein from August 27, 1987 to the end of 1987, BFP was a partnership composed of WAYNE L. PEDERSEN, MARLENE PEDERSEN, who is also known as MARLENE M. PEDERSEN, and RUSSELL J. BARTON; WAYNE PEDERSEN and MARLENE PEDERSEN assigned their interest to OFF-ROAD VEHICLES - RECREATION & FAMILY CAMPGROUND, INC. Subject to the effect of that assignment, it is a co-partnership.

3. At all times since September 29, 1987, defendant IMPERIAL SAVINGS & LOAN ASSOCIATION has been and now is a corporation organized and existing under

the laws of the state of California.

4. Defendants PAUL OSBORNE, WILLIAM LITTLE, DENNIS ROY, ARTHUR RITZ, JOSE CRUZ, RICHARD MARCY, and DOES 1 to 10, purchased the real property described on Exhibit A at a Trustee's Sale and Does 1 to 10 are successors in interest of some interest therein.

5. The true names and capacities, whether individual, corporate, associate, or otherwise of defendants named herein as Does 1 through 10, inclusive, are unknown by plaintiff, who therefore sues said defendants by such fictitious names. Plaintiff will ask leave of court to amend this Complaint to show the true names and capacities of such defendants when the same have been ascertained.

6. At all times prior to July 29, 1989, SHELDON L. FOREMAN and ANN FANT FOREMAN and plaintiff BFP have been and were in open, notorious, conspicuous and

exclusive possession of said real property and defendants, and each of them, had notice of the rights and claims of said BFP, SHELDON L. FOREMAN and ANN FANT FOREMAN.

7. At all times herein mentioned prior to the recording on August 25, 1987, of the deed hereinafter referred to, executed by SHELDON L. FOREMAN and ANN FANT FOREMAN, they owned the real property in the City of Newport Beach, County of Orange, described on Exhibit "A", attached hereto and hereby incorporated herein.

8. On or about July 10, 1987, RUSSELL J. BARTON and WAYNE L. PEDERSEN and MARLENE M. PEDERSEN, orally agreed and agreed in writing that WAYNE L. PEDERSEN be the buyer of said real property, that said WAYNE L. PEDERSEN given an option to said plaintiff to purchase said real property during the

period of One Hundred Eighty (180) days from the date of recordation of the deed describing said real property, for a sum equal to indebtedness secured by said real property consented to by RUSSELL J. BARTON, that defendants not convey or encumber said real property otherwise during said option period without consent of plaintiff RUSSELL J. BARTON that if RUSSELL J. BARTON exercise said option he would pay 25% of profits to said WAYNE L. PEDERSEN.

9. On or about August 3, 1987, SHELDON L. FOREMAN and ANN FANT FOREMAN, and WAYNE L. PEDERSEN made, executed and delivered escrow instructions in and by which they named Cress Escrow Corporation in Irvine, California, as escrow holder, and agreed to the sale of said real property by said plaintiff and purchase of it by said WAYNE L. PEDERSEN. WAYNE L. PEDERSEN promised, represented, war-

ranted and agreed to deliver to plaintiff, Three Hundred Fifty-six Thousand Two Hundred Fifty ($356,250.00) Dollars being the proceeds of a loan to be secured by a first trust deed describing said property securing a note for approximately Three Hundred Fifty-six Thousand Two Hundred Fifty ($356,250.00) Dollars and certain rare coins to be delivered.

10. Thereafter, the parties to said escrow amended the escrow instructions to provide that said MARLENE PEDERSEN be a party a a buyer.

11. During August of 1987, newspapers stated that WAYNE L. PEDERSEN was under investigation for alleged fraudulent sales of rare coins and SHELDON L. FOREMAN and ANN FANT FOREMAN voiced to WAYNE L. PEDERSEN concerns regarding the same; the parties to the escrow orally agreed that in place of the rare coins, a partnership be formed, that WAYNE L.

PEDERSEN and MARLENE M. PEDERSEN deed to it and make, execute and deliver a note and a trust deed describing said real property and SHELDON L. FOREMAN and ANN FANT FOREMAN as beneficiaries to secure said note that said note be payable to SHELDON L. FOREMAN and ANN FANT FOREMAN in the sum of Two Hundred Thousand Dollars ($200,000.00), and WAYNE L. PEDERSEN and MARLENE M. PEDERSEN promised, represented, warranted and agreed that they would deliver such note and trust deed, that the escrow close, and that plaintiff SHELDON L. FOREMAN and ANN FANT FOREMAN may remain in possession of said real property under delivery of said Two Hundred Thousand Dollars ($200,000.00) note and trust deed in good and sufficient form and recording thereof and until RUSSELL J. BARTON was ready to commence remodeling; later, in August, the parties orally agreed that WAYNE L.

PEDERSEN and MARLENE M. PEDERSEN deed to BFP and that BFP execute the trust deed naming SHELDON L. FOREMAN and ANN FANT FOREMAN as beneficiaries.

12. Pursuant to said oral agreement, the following occurred and documents which were recorded in the official records of Orange County:

a. A deed dated August 12, 1987, describing SHELDON L. FOREMAN and ANN FANT FOREMAN as grantors, WAYNE L. PEDERSEN and MARLENE M. PEDERSEN as grantees, and describing said real property. Said deed was recorded on August 25, 1987, as Instrument No. 87-481934.

b. A deed of trust describing WAYNE L. PEDERSEN and MARLENE M. PEDERSEN as trustors, L. C. Service Corporation trustee, Loan Marketing and Brokers' Services, Inc., beneficiary, and describing said real

property, securing a note for Three Hundred Fifty-six Thousand Two Hundred Fifty Dollars ($356,250.00) and interest at 12% per annum, principal and interest payable Three Thousand Six Hundred Sixty-four and 44/100 Dollars ($3,664.44) on the first day of each month beginning October 1, 1987. Said trust deed was recorded on August 25, 1987, as Instrument No. 87-481935. Said trust deed was assigned by said Loan Marketing and Brokers' Services, Inc. to Abbey Mortgage Corporation by assignment recorded August 2, 1987, as Instrument No. 87-841936, and by it to Imperial Savings Association by assignment recorded August 25, 1987, as Instrument No. 87-841937.

c. On or about August 16, 1987, RUSSELL J. BARTON and WAYNE L.

PEDERSEN and MARLENE PEDERSEN made, entered into and delivered a partnership agreement dated August 26, 1987, whereby BFP, a partnership, was formed.

d. A deed dated August 27, 1987, describing WAYNE L. PEDERSEN and MARLENE M. PEDERSEN, as grantors, plaintiff BFP, a general partnership, as the grantee, and said real property [sic. "and" omitted] was recorded on September 16, 1987, as Instrument No. 87-514675. On September 11, 1986, RANDY JONES, being duly sworn, said to Patrick Wruck, notary, that he saw said grantors execute and deliver said deed.

e. On August 27, 1987, plaintiff BFP made, executed and delivered a deed of trust naming SHELDON L. FOREMAN and ANN FANT FOREMAN as

beneficiaries and describing said real property securing a note for Two Hundred Thousand Dollars ($200,000.00). Deed of trust was duly recorded on September 16, 1987, as Instrument No. 87-514676. A copy of said deed of trust is marked Exhibit A and attached hereto. In and by said trust deed, it was agreed that in the event of a lawsuit between the parties, the prevailing party would be entitled to reasonable attorney's fees. Said note provided that interest at 10% per annum be paid monthly beginning on September 27, 1987, and principal be due on or before February 27, 1988.

13. Plaintiff performed all of the covenants and obligations to be performed by them in said agreements, including said purchase agreement, said partnership

agreement, and the escrow instructions as amended.

14. On or about September 29, 1987, without the consent, permission or approval and without prior knowledge of plaintiff or RUSSELL J. BARTON, WAYNE L. PEDERSEN and MARLENE M. PEDERSEN made, executed and delivered a deed whereby they purported to convey said property to OFF-ROAD VEHICLES - RECREATION & FAMILY CAMPGROUND, INC., a California corporation. A copy of said deed is attached hereto as Exhibit B, but is not incorporated herein by reference. At the time of the making and acceptance of said deed, the grantee knew and should have known of plaintiff's possession of and claims to said real property.

15. No payments have been made on either of the notes secured by trust deeds on said real property except the payment by SHELDON L. FOREMAN n the note

secured by the first trust deed in order to reinstate it during 1988.

16. In 1988, after SHELDON L. FOREMAN had reinstated the note secured by the first trust deed and while plaintiff BFP and SHELDON L. FOREMAN litigated their claims against OFF-ROAD VEHICLES - RECREATION & FAMILY CAMPGROUND, INC., defendant IMPERIAL SAVINGS & LOAN ASSOCIATION caused to be given a notice of default under the first deed of trust and thereafter noticed a sale to take place in December of 1988. The notice of sale stated that the sale would be for cash and designated no equivalents allowed by Section 2924(b) of the California Civil Code. A copy of the notice is marked as Exhibit C and incorporated herein.

17. In December of 1988, OFF-ROAD VEHICLES - RECREATION & FAMILY CAMPGROUND, INC., filed an involuntary Petition Under Chapter 11 of the U. S. Bank-

ruptcy Code alleging that BFP, a Partnership, was insolvent. Said petition was filed in the U. S. Bankruptcy Court for the Central District of California sitting in Santa Ana No. SA-88-07521-JR.

18. In said petition, it was alleged that BFP's address was 3303 F-1 Harbor Blvd., Costa Mesa, California. In 1987, that had been the address of BFP, however, at no time after 1987 was 3303 F-1 Harbor Boulevard, the address of BFP. BFP, a Partnership, filed a response to said petition and showed in the upper left hand corner of the first page that it was filed in pro per and that its address was 3051 Yukon Circle, Costa Mesa, CA 92626.

19. At a hearing in connection with the petition for adjudication under Chapter 11 held on or about May 11, 1989, counsel for IMPERIAL SAVINGS & LOAN ASSOCIATION appeared at the hearing and

knew at that time in that hearing that BFP was present by its general partner, RUSSELL BARTON, and by a claimed partner, OFF-ROAD VEHICLES, by its president, GARY HENIG, AND ITS COUNSEL, Armando Lopez, and BFP and RUSSELL BARTON were present by their counsel, Roy B. Woolsey.

20. At said time and place, plaintiff BFP and SHELDON L. FOREMAN and ANN FANT FOREMAN requested that the sale on foreclosure be continued until after July 17, 1989, the date on which the quiet title action in the state court determining title to said real property was set for trial. Defendant, IMPERIAL SAVINGS & LOAN ASSOCIATION stated that it would not conduct the sale until it got a copy of the order, meaning a copy of the order of the Bankruptcy Court on the pending petition for adjudication under Chapter 11.

21. On or about May 18, 1989,

knew at that time in that hearing that BFP was present by its general partner, RUSSELL BARTON, and by a claimed partner, OFF-ROAD VEHICLES, by its president, GARY HENIG, AND ITS COUNSEL, Armando Lopez, and BFP and RUSSELL BARTON were present by their counsel, Roy B. Woolsey.

20. At said time and place, plaintiff BFP and SHELDON L. FOREMAN and ANN FANT FOREMAN requested that the sale on foreclosure be continued until after July 17, 1989, the date on which the quiet title action in the state court determining title to said real property was set for trial. Defendant, IMPERIAL SAVINGS & LOAN ASSOCIATION stated that it would not conduct the sale until it got a copy of the order, meaning a copy of the order of the Bankruptcy Court on the pending petition for adjudication under Chapter 11.

21. On or about May 18, 1989,

defendant IMPERIAL SAVINGS & LOAN ASSOCIATION filed in said matter a Motion for an Order Granting Relief form the Automatic Stay and, thereafter, on May 22, 1989, caused to be executed an affidavit of service stating that the services of a copy of the notice of motion, together with a motion and declaration was served on BFP, a Partnership, by mailing to 3303 F-1 Harbor Blvd., Costa Mesa, California.

22. BFP had not been at 3303 F-1 Harbor Boulevard, Costa Mesa, California for over a year and all of the parties hereto knew that it was the policy of the United States post office not to forward mail for more than one year from the time of a change of address.

23. No copy of said notice of motion, motion or declaration was ever received by BFP, and plaintiff is informed and believes and, based upon said

information and belief allege, that the envelope containing the notice of hearing, motion, and declaration was returned to the office of counsel for defendant, Imperial Savings Association, and that Imperial Savings Association knew that defendant did not know that said motion had been filed and concealed those facts from plaintiff.

24. Said notice stated that there would be a hearing on said motion on June 12, 1989. Thereafter, the Bankruptcy Court, not realizing that BFP had not been served, made an order granting said motion. Notwithstanding that BFP had not appeared at said hearing and had no knowledge thereof, IMPERIAL SAVINGS & LOAN ASSOCIATION forwarded a Judgment and Order Vacating the Automatic Stay to the Bankruptcy Court together with an affidavit that BFP was served by mailing to 3033 F-1 Harbor Blvd., Costa Mesa, Cali-

fornia. Said copies allegedly so served were never received by plaintiffs, SHELDON L. FOREMAN or ANN FANT FOREMAN. Plaintiffs are informed and believe, and, based upon such information and belief allege, that the post office returned the same to counsel for IMPERIAL SAVINGS and that IMPERIAL SAVINGS knew that said order was entirely without notice to or knowledge of SHELDON L.FOREMAN, ANN FANT FOREMAN and plaintiff.

25. In 1988, SHELDON L. FOREMAN paid $32,000.00 to IMPERIAL SAVINGS to reinstate the trust deed and note and from time to time discussed the pendency of the foreclosure sale with him and had told him that he would reinstate but not until the last minute hoping that the matter of title had been determined between him and Off-Road Vehicles.

26. SHELDON L. FOREMAN, ANN FANT FOREMAN and plaintiff are informed and

believe and, based thereon allege, that in May of 1989, defendant IMPERIAL SAVINGS informed an agent of SHELDON L. FOREMAN, ANN FANT FOREMAN and plaintiff that said defendant would give notice of the foreclosure sale if it was to occur, and it did not do so. The beneficiaries under the deed of trust misled SHELDON L. FOREMAN, ANN FANT FOREMAN and plaintiff to believe that there would be no foreclosure sale until after what was determined in the Superior Court trial then set for July 17, 1989, and SHELDON L. FOREMAN, ANN FANT FOREMAN and plaintiff believed there would be no sale until after July 17, 1989. The trustee under the deed of trust promised a notice of continuance of the sale but did not provide the same and, by reason thereof, the sale was invalid.

27. SHELDON L. FOREMAN, ANN FANT FOREMAN and plaintiff had heard from said

agent and reasonably understood and believed that the sale would not take place until after the trial in the quiet title action then scheduled for July 17, 1989.

28. Without any notice to SHELDON L. FOREMAN, ANN FANT FOREMAN and plaintiffs, said sale was conducted on or bout July 12, 1989. Said property was then worth over $725,000.00. Defendants, PAUL OSBORNE, WILLIAM LITTLE, DENNIS ROY, ARTHUR RITZ, JOSE CRUZ and RICHARD MARCY, who were the purchasers at the sale, bid $433,000.00 for said property.

29. SHELDON L. FOREMAN, ANN FANT FOREMAN and plaintiff was informed and believe and, based upon such information and belief allege, that said $433,000.00 was not paid on the date of the sale in cash or any equivalent of cash but that the same was paid later. At no time did SHELDON L. FOREMAN, ANN FANT FOREMAN and

plaintiff consent to any sale and at no time did they consent to any sale other than for cash.

30. Prior to the commencement of the above entitled matter and after said sale, SHELDON L. FOREMAN, ANN FANT FOREMAN and plaintiff offered to pay said defendants the sum of $433,000.00 together with an additional $25,000.00 for the property. Defendants refused to accept said offer and refused to convey said property.

31. Within the year last past, to wit, on or about July 12, 1989, a foreclosure sale was conducted at [sic. meaning "of"] said property. Under and pursuant to said trust deed wherein and whereby plaintiff involuntarily paid [sic. meaning "made"] a transfer for which it received less than the reasonably equivalent value in exchange for such transfer, and was insolvent on the date

that such transfer was made, or became insolvent as a result of such transfer or obligation.

32. SHELDON L. FOREMAN and ANN FANT FOREMAN stand ready to redeem the property from the sale and subject it to the interests of BFP as an owner subject to the FOREMAN's deed of trust.

WHEREFORE, plaintiff respectfully prays that this Court declare the transfer of assets to defendants null and void, vacate and set aside the trustee's deed of trust given with respect thereto, and award plaintiff costs of action and such other and further relief as the Court may deem just.

Dated November 24, 1989.

ROY B. WOOLSEY, INC., and
WOOLSEY, ANGELO & THATCHER

By: ROY B. WOOLSEY
Attorneys for Plaintiff

RBW:lb
D85:FOREBFP.P26

D113:BFPSC.P91

reinstate the trust deed and note and from time to time discussed the pendency of the foreclosure sale with him and had told him that he would reinstate but not until the last minute hoping that the matter of title had been determined between him and Off-Road Vehicles.

26. SHELDON L. FOREMAN, ANN FANT FOREMAN and plaintiff are informed and believe and, based thereon allege, that in May of 1989, defendant IMPERIAL SAVINGS informed an agent of SHELDON L. FOREMAN, ANN FANT FOREMAN and plaintiff that said defendant would give notice of the foreclosure sale if it was to occur, and it did not do so. The beneficiaries under the deed of trust misled SHELDON L. FOREMAN, ANN FANT FOREMAN and plaintiff to believe that there would be no foreclosure sale until after what was determined in the Superior Court trial then set for July 17, 1989, and SHELDON L.

FOREMAN, ANN FANT FOREMAN and plaintiff believed there would be no sale until after July 17, 1989. The trustee under the deed of trust promised a notice of continuance of the sale but did not provide the same and, by reason thereof, the sale was invalid.

27. SHELDON L. FOREMAN, ANN FANT FOREMAN and plaintiff had heard from said agent and reasonably understood and believed that the sale would not take place until after the trial in the quiet title action then scheduled for July 17, 1989.

28. Without any notice to SHELDON L. FOREMAN, ANN FANT FOREMAN and plaintiffs, said sale was conducted on or bout July 12, 1989. Said property was then worth over $725,000.00. Defendants, PAUL OSBORNE, WILLIAM LITTLE, DENNIS ROY, ARTHUR RITZ, JOSE CRUZ and RICHARD MARCY, who were the purchasers at the sale, bid

$433,000.00 for said property.

29. SHELDON L. FOREMAN, ANN FANT FOREMAN and plaintiff was informed and believe and, based upon such information and belief allege, that said $433,000.00 was not paid on the date of the sale in cash or any equivalent of cash but that the same was paid later. At no time did SHELDON L. FOREMAN, ANN FANT FOREMAN and plaintiff consent to any sale and at no time did they consent to any sale other than for cash.

30. Prior to the commencement of the above entitled matter and after said sale, SHELDON L. FOREMAN, ANN FANT FOREMAN and plaintiff offered to pay said defendants the sum of $433,000.00 together with an additional $25,000.00 for the property. Defendants refused to accept said offer and refused to convey said property.

31. Within the year last past, to

wit, on or about July 12, 1989, a foreclosure sale was conducted at [sic. meaning "of"] said property. Under and pursuant to said trust deed wherein and whereby plaintiff involuntarily paid [sic. meaning "made"] a transfer for which it received less than the reasonably equivalent value in exchange for such transfer, and was insolvent on the date that such transfer was made, or became insolvent as a result of such transfer or obligation.

32. SHELDON L. FOREMAN and ANN FANT FOREMAN stand ready to redeem the property from the sale and subject it to the interests of BFP as an owner subject to the FOREMAN's deed of trust.

WHEREFORE, plaintiff respectfully prays that this Court declare the transfer of assets to defendants null and void, vacate and set aside the trustee's deed of trust given with respect thereto,

and award plaintiff costs of action and such other and further relief as the Court may deem just.

Dated November 24, 1989.

ROY B. WOOLSEY, INC., and
WOOLSEY, ANGELO & THATCHER
Attorneys for Plaintiff

[Exhibits not attached to Complaint:

Exhibit A: Trust Deed, BFP to Foreman referred on on pages 42, 43 and 50,

Exhibit B: Deed from Pedersens to Off-Road, referred to on page 51,

Exhibit C: Notice of Sale, referred to on page 53,

are attached to Respondent's Motion as Exhibits A, B & C to Exhibit 2 to Exhibit A (this Joint Appendix pages 164-174); see also, petitioner's Memorandum of P's and A's, DN 5)]

FILED JAN 2 1990

* * *

UNITED STATES BANKRUPTCY COURT

CENTRAL DISTRICT OF CALIFORNIA

In re	Bk. No. SA89-06771-JR
BFP, a Partnership,	CHAPTER 11
BFP, a Partnership, Plaintiff vs. IMPERIAL SAVINGS & LOAN ASSOCIATION, a California corporation; PAUL OSBORNE; WILLIAM LITTLE; DENNIS ROY; ARTHUR RITZ; JOSE CRUZ, RICHARD MARCY; and DOES 1	Adv. No. SA89-0977-JR NOTICE OF MOTION AND MOTION TO DISMISS COMPLAINT FOR FAILURE TO STATE A CLAIM UPON WHICH RELIEF CAN BE GRANTED; MEMORANDUM OF POINTS AND AUTHORITIES; DECLARATION OF MICHAEL R. SMENT [Fed. Bk. Rule 7012 (b); Rule 12(b)(6); F.R.C.P.]

* * *

Defendants.

* * *

TO: DEBTOR, ITS ATTORNEY AND ALL INTERESTED PARTIES:

PLEASE TAKE NOTICE that on February 6, 1990, at 11:00 a.m., or as soon thereafter as the matter may be heard or

as soon as the matter may be heard as specified by the Court, before the Honorable John Ryan, United States Bankruptcy Judge, presiding, in Courtroom 510 of the United States Bankruptcy Court located at 34 Civic Center Plaza, Santa Ana, California, Defendants PAUL OSBORNE, WILLIAM LITTLE, DENNIS ROY, ARTHUR RITZ, JOSE J. CRUZ (erroneously sued herein as JOSE CRUZ), and RICHARD MARCZ (erroneously sued herein as RICHARD MARCY) (collectively "these Defendants" herein) will move and request this Court to dismiss the Complaint To Declare Transfer of Real Property Null And Void, etc., of Debtor/Plaintiff BFP, a partnership ("Debtor") pursuant to Federal Bankruptcy Rule 7012(b) and Rule 12(b)(6) of the Federal Rules of Civil Procedure.

This Motion will be made on the ground that the Complaint fails to state a claim against these Defendants upon

which relief can be granted. The Motion will be based upon this Notice, the attached Memorandum of Points and Authorities, the attached Declaration of Michael R. Sment, the pleadings and records on file in connection with this Bankruptcy case and these Defendants' Motion for Relief From Automatic Stay, etc., filed herein, on certain matters of which this Court is requested to take judicial notice, and on such other matters, testimony and argument as are presented at any hearing with respect hereto.

DATED: December 28, 1989

Respectfully submitted,

/s/ Michael R. Sment

Attorneys for Defendants

* * *

MEMORANDUM OF POINTS AND AUTHORITIES

I.

STATEMENT OF FACTS

On or about December 31, 1988, an involuntary Chapter 11 petition was filed against Debtor in this Court (Bk. No. SA88-07521-JR). Defendant IMPERIAL SAVINGS ASSOCIATION (erroneously sued herein as IMPERIAL SAVINGS & LOAN ASSOCIATION) ("Imperial") the beneficiary of the first trust deed encumbering the subject property[1] obtained a Judgment and

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1. Suspiciously, Debtor's Complaint does not describe the real property which is the subject of it. Paragraph 7 of the Complaint refers to an Exhibit "A", but this Exhibit was not attached to the copy of the Complaint served on these Defendants. In fact, the Complaint served on these Defendants had no exhibits attached to it whatsoever. These Defendants are informed and believe, and based thereon allege, that the real property which is the subject matter of the Complaint is generally described as 225 Via Genoa, Lido Isle, Newport Beach, California ("subject property" herein). The subject property is legally described in Exhibit "1" which was attached to these Defendants' Motion for Relief From Automatic Stay (Ref. No. M9-0419-JR) filed herein November 8, 1989. A true and correct copy of the Motion for Relief

Order Vacating Automatic Stay in that case which was entered by this Court on June 15, 1989. Pursuant to that Judgment, Imperial obtained relief from the Automatic Stay in the prior Chapter 11 case to proceed with foreclosure and hold a trustee's sale of the subject property.

Pursuant to an Order requested by Debtor and entered herein on June 14, 1989, the prior involuntary Chapter 11 case was dismissed. On July 12, 1989 -- over 3-1/2 months prior to the filing of this bankruptcy case -- and pursuant to the aforementioned Judgment and dismissal order, the subject property was sold at a

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...Continued...

(with exhibits tabbed as on the original) is attached hereto as Exhibit "B" and incorporated herein by this reference. Suspiciously, Debtor's Complaint was not served on any attorney for these Defendants despite the clear knowledge of Debtor and its attorneys that Rich & Ezer has been representing these Defendants in this bankruptcy case and in several Orange County Superior Court actions(s).

properly scheduled trustee's sale, conducted on behalf of Imperial, to these Defendants for the sum of $433,600.00. A Trustee's Deed Upon Sale was issued on July 18, 1989 and recorded on July 21, 1989, as Instrument No. 89-3850 with the Official Records of Orange County. A true and correct copy of that trust deed is attached to these Defendant's Motion for Relief as Exhibit "6" and is incorporated herein by reference. Pursuant to California law, title to the subject property became vested in Movants upon the delivery and execution of that trustee's deed.

On or about July 14, 1989, Debtor and others filed an action in the Superior Court for the County of Los Angeles (Case No. 596890) in which they attempted to attack the validity of the trustee's sale. After discussions with Defendant Dennis Roy: that previous action was

dismissed, a lis pendens recorded in connection therewith was withdrawn, and the occupant of the subject property (Sheldon Foreman, a member of Debtor) voluntarily vacated it and surrendered it to these Defendants. A true and correct copy of a Declaration by Dennis Roy (filed in support of these Defendants' Superior Court Motion to Expunge) in this regard is attached to these Defendants' Motion for Relief Exhibit "7" and is incorporated herein by reference.

Thereafter, on August 18, 1989, Debtor and others commenced yet another action in the Superior Court for the County of Orange (Case No. 600205) against these Defendants and Imperial to quiet title, for declaratory relief, to impress a trust and for damages. A true and correct copy of the Superior Court Summons and Complaint in connection therewith is attached collectively Exhib-

it "2" to these Defendants' Motion for Relief and is incorporated herein by reference. In connection with that Superior Court action, Debtor and others also recorded a Notice of Pending Action (lis pendens) against the subject property.

On or about October 12, 1989, these Defendants filed a Demurrer to Debtor's Superior Court Complaint along with a Motion for Order Expunging the Lis Pendens, with a Superior Court hearing scheduled thereon for October 17, 1989 at 9:00 a.m. True and correct copies of the Demurrer and Motion to Expunge (with exhibits) are attached to Exhibits "3" and "4", respectively, these Defendants' Motion for Relief and are incorporated herein by reference. On October 25, 1989 -- less than two days before that scheduled hearing, and apparently to avoid an undesirable outcome in the Superior Court

action -- Debtor commended the instant bankruptcy case. The hearing was then continued by the Superior Court to November 14, 1989.

On November 3, 1989, these Defendants filed their Motion for Relief From Automatic Stay herein (Ref. No. M9-0419-JR), along with an application to shorten time for the hearing thereon (so that it could be heard prior to scheduled Superior Court hearing). That application was denied, and these Defendant's Motion for Relief came on for hearing on November 28, 1989 at 9:00 a.m. in this Court. Debtor had filed opposition in Response to the Motion for Relief. On December 145, 1989, this Court entered its Judgment and Order Vacating Automatic Stay, which vacated the Automatic Stay herein for all purposes as to these Defendants, effective November 28, 1989. A true and correct copy of that Judgment is attached

hereto as Exhibit "A" ad incorporated herein by reference. That Judgment has not been appealed from or challenged in any manner, and it became final December 24, 1989.

Movants are informed and believe, and based thereon allege, that on November 27, 1989 (the day before the hearing on these Defendants' Motion for Relief), Debtor filed this adversary Complaint. It also recorded another lis pendens against the subject property. Debtor's representative (Mr. Foreman) did not inform this Court or counsel of that filing when he appeared at the hearing.

On or about December 13, 1989 -- the day before the new hearing scheduled in the Orange County Superior Court on these Defendants' Demurrer and Motion to Expunge -- Debtor dismissed the Orange County Superior Court action against these Defendants but not against Imperi-

al. These Defendants are informed and believe, and based thereon allege, that said dismissal was intended to avoid an adverse determination against Debtor in the Superior Court, and when combined with the filing of this adversary complaint and the recording of a list pendens in connection therewith, to further confuse and cloud the title with respect to the subject property.

Debtor's Complaint clearly sets forth no claim for relief or cause of action against these Defendants. These Defendants were innocent, good-faith and third-party purchasers, was merely a successful bid at a trustee's sale held by Imperial. That was conducted pursuant to a Judgment vacating the stay in, and order dismissing, the prior Chapter 11 case involving Debtor. That trustee's sale occurred over 3-1/2months prior to the filing of the bankruptcy case herein.

Under Federal bankruptcy law, Debtor cannot set aside the trustee's sale with respect to these Defendants. Under California law, Debtor also cannot set aside the trustee's sale with respect to these Defendants. Accordingly, Debtor's Complaint against these Defendants must be dismissed with prejudice.

II.

DEBTOR'S COMPLAINT MUST BE DISMISSED AS IT FAILS TO STATE A CLAIM AGAINST THESE DEFENDANTS UPON WHICH RELIEF CAN BE GRANTED

In lieu of an answer, Federal Bankruptcy Rule 7012(a) specifically authorizes these Defendants to file a motion to dismiss for failure to state a claim. Federal Bankruptcy Rule 7012(b) also specifically incorporates the provisions of Rule 12(b) of the Federal Rules of Civil Procedure into bankruptcy adversary proceedings.

Rule 12(b)(6) F.R.C.P. specifically requires that the failure to state a claim upon which relief can be granted must addressed by a motion. It further provides that such a motion "shall be made before pleading if a further pleading is permitted." (illegible) In re Longhorn Securities Litigation (W.D. Okla. 1983) 573 F.Supp. 278, 279-80.) The Court should dismiss a complaint if it appears beyond a doubt that the plaintiff cannot prove any set of facts upon which to support a claim for relief against the moving defendants. (Conley v. Gibson 1957) 355 U.S. 41, 45-46, 78 S.Ct. 99, 101-102; In Re Cole Associates (Bk. Utah 1980) 7 B.R. 154, 156.) In Jackson v. Nelson (9th Cir. 1968) 451 FF.2d 872, 873-74, the Ninth Circuit Court of Appeals upheld the dismissal of a complaint which contained only a series of broad conclusionary statements and

concluded that the complaint failed to state a cause of action against the defendants. The Court of Appeal noted that there would be "no way of determining which defendant, if any, is being charged with responsibility for a particular grievance." (See also Sutton v. Eastern Viavi Co. (7th Cir. 1948) 138 F.2d 959, 960 -- a complaint must be dismissed for failure to state a claim if it fails to link the particular named parties to the wrong-alleged.)

While Debtor's 12-page Complaint refers to a number of alleged wrongs and problems, none of those wrongs are alleged to have been committed by these Defendant, nor is it alleged that these Defendants had any knowledge of those alleged wrongs. The Complaint is suspiciously similar and almost identical to the Complaint filed in the Superior Court action (Case No. 600205) and which is

attached as Exhibit "2" to these Defendants' Motion for Relief. In fact, of the 12 paragraphs contained in the Complaint, only paragraphs 4, 28 and 30 refer at all to these Defendants. In fact, those paragraphs merely set forth the factual occurrences with respect to these Defendants' purchase of the subject property at the trustee's sale and their subsequent refusal to accept an offer from Mr. and Mrs. Foreman. No specific improper, wrongful or illegal act is alleged to have been committed by any of these Defendants, except for their purchase of the subject property as third-party bidders.

III.

ACCORDING TO FEDERAL BANKRUPTCY LAW, DEBTOR CANNOT SET ASIDE THE INVOLVED TRUSTEE'S SALE TO THESE DEFENDANTS

Debtor's Complaint specifically states that: "this adversary proceeding

is brought pursuant to Section 548(a)(2)(A) and (b)(i) . . . under Title 11, United States Code." No other statutory basis is set forth for setting aside the involved trustee's sale or for assessing damages against these Defendants and these Defendants are informed and believe, and based thereon allege, that no other statutory sections would be applicable or available to Debtor.

According to a recent decision of the United States Appellate Panel of the Ninth Circuit, which is binding on this Court, 11 U.S.C. Section 547 and 548 cannot bee used to set aside a pre-petition trustee's sale based on facts as set forth here. In re Ehring, (9th Cir. BAP 1988) 91 B.R. 897, 899-900, the Bankruptcy Appellate Panel considered whether section 548 could be used to set aside a pre-petition trustee's sale. The Bankruptcy Appellate Panel concluded that

that code section prevailed. It specifically noted that:

"The Ninth Circuit has held that for purposes of Section 548, a transfer of real property occurs at the time the creditor's security interest is perfected, as opposed to the time of the subsequent foreclosure sale. In Re Madrid, 725 F.2d 1197, 1200-01 (9th Cir. 1984). Thus, where the perfection occurs more than one year prior to the date of bankruptcy, the transfer is not avoidable as a fraudulent conveyance under Section 548. 725 F.2d at 1201. The Court rejected an earlier contrary decision by the Fifth Circuit which ruled that the transfer occurs at the time of the foreclosure sale. See Durrett v. Washington Nat. Ins. Co., 621 F.2d 201, 204 (5th Cir. 1980)."

* * *

"We find the interpretation of when a transfer occurs in Madrid to be applicable to the present case. Although Madrid involves Section 548, the Code provisions regarding fraudulent transfers, and while this appeal involves allegedly voidable preferences under Section 547, both sections define the time of transfer in relation to when the transaction is perfected under state law against the interests of a bonafide purchaser. In addition, the Madrid court specifically stated that its holding was consistent with the treatment of similar transfers under Section 547. 725 F.2d at 1201 n.2. The Panel is not free to disregard such a clear statement from the Ninth Circuit on this issue. See Zuniga v. United Can Co., 812 F.2d 443, 450 (9th Cir.

1987); Hasbrouck v. Texaco, Inc., 663 F.2d 930, 933 (9th Cir. 1981). . . . In California, perfection of a deed of trust occurs upon the recordation of the document with the county recorder."

Debtor's Complaint (p. 5, section 12(b)), specifically states that the first deed of trust in favor of Imperial was recorded on August 25, 1987, as Instrument No. 87-481935 and that the assignment to Imperial was recorded on August 25, 1987 as Instrument No. 87-841937. Thus, Debtor's Complaint admits that the July 12, 1989 trustee's sale occurred almost two years after the trust deed was recorded and over 27 months prior to the commencement of this adversary action. According to Ehring, the recording of the deed of trust was the date when the transfer was perfected herein. (91 B.R. at 900).

11 U.S.C. section 548(a) clearly states that a trustee (or debtor) may only avoid a transfer "that was made or incurred on or within one year before the date of filing of the petition". As the transfer (recording of the first trust deed) occurred on August 25, 1987, and Debtor's bankruptcy petition was not filed until October 25, 1989 -- over two years later -- section 548(a) does not provide any authority for the setting aside of the involved trustee's sale.

In fact, when this bankruptcy case was initially filed, these Defendants; counsel spoke with Debtor's counsel regarding Debtor's prospective adversary complaint. These Defendants' counsel clearly explained to Debtor's counsel that section 548 could not be a basis to set aside the trustee's sale, and specifically referred Debtor's counsel to the Madrid and Ehring decisions.

Although questions have arisen in the past as to the validity of the Madrid decision (in light of the 1984 Amendment to the Bankruptcy Code), the Bankruptcy Appellate Panel in Ehring determined that the Madrid decision is still good law in the Ninth Circuit and binding upon all lower courts. The Bankruptcy Appellate Panel specifically stated that:

> "Some courts have found that the changes [by the 1984 Amendments] overruled Madrid and ratify the Durrett approach. (Citations omitted). . . . However, we agree with those courts which have found that Madrid is still valid law. See In re Winshall Settlor's Trust, 758 F.2d 1136, 1138-39 n.3 (6th Cir. 1985); Lower Downtown Assocs. v. Brazosbank Sav. Ass., 51 B.R. 662, 665 (Colo. 1985). On its face, the amendment to Section 101(50) does

not clearly express an intent to overrule Madrid. . . . However, we note that the Madrid court relied on Section 548(a) itself for its holding that the 'transfer' in question occurs when the lien is perfected rather than when the foreclosure sale takes place. (Citations omitted) In Madrid, the Ninth Circuit noted that their holding was in accord with cases decided under Section 547 (illegible) B.R. at 901) (Emphasis added.)

The Bankruptcy Appellate Panel in Ehring also considered whether or not the Durrett approach (where a debtor claims that the property was sold at the foreclosure sale for less than its fair market value) not applicable to the Ninth Circuit. It note that:

"Even assuming this argument [challenging the adequacy of the

foreclosure price] was property raised before this Panel, we find no windfall where the property is sold at the lien value in a non-collusive regularly held foreclosure sale. See In re Verna, supra, 68 B.R. at 252; Golden v. Tomiyasu, 387 P. 2d 939, 995 (Nev. 1963). Western [the foreclosing beneficiary] should not be penalized for subsequently using the purchased property to its benefit and the resale of the property at its fair market value violates no Code purposes." (91 B.R. at 901.)

IV.

ACCORDING TO FEDERAL BANKRUPTCY LAW AND CALIFORNIA LAW, THE INVOLVED TRUSTEE'S SALE WAS PROPERTY HELD

Debtor's Complaint challenges the involved trustee's sale on two grounds. First, that Imperial's Motion for an

Order Granting Relief From the Automatic Stay was not property served on Debtor (Sections 18, 21, 23 and 24). Second, that Imperial promised to give notice of any trustee's sale (Sections 26, 27 and 28). Both of these allegations, however, are not well-supported by either the law or the facts. Debtor's allegations regarding Imperial's Motion For Relief make no sense. Debtor essentially argues that it was improperly served with the Motion. Debtor's Complaint, however, admits that if the bankruptcy petition listed Debtor's address Harbor Blvd. (p. 7, L. 27-28), and that Imperial served it at the address of record (pp.8-9, l. 21-1). In addition, Defendants are informed and believe, and based thereon allege, that Debtor, its attorneys or its representatives did in fact appear at the hearing on the Motion for Relief. In any event, Debtor has failed to appeal the

Judgment and Order Vacating Automatic Stay entered by this Court on June 15, 1989 with respect to Imperial's Motion, and it can no longer challenge that Judgment by this collateral attack or otherwise. It is final.

Debtor's allegations regarding Imperial's Motion fail for another reason, however. Debtor's prior Chapter 11 once was dismissed by this Court pursuant to an Order entered on June 14, 1989 -- almost <u>one month prior to the Trustee's Sale</u> being held. Suspiciously, Debtor's Complaint fails to contain any reference whatsoever to that dismissal order. Pursuant to 11 U.S.C. Section 362 (c)(2)(b), the Automatic Stay in Debtor's prior Chapter 11 case was terminated upon the dismissal of that case. Pursuant to California law, Imperial was thus entitled to hold the trustee's sale so long as it occurred no sooner than seven days

after the entry of that dismissal order. (illegible) requirements with respect to a notice of a trustee's sale and that section only requires that written notice be given in the manner set forth therein. No additional notice is required by be given to any borrower. (U. S. Cold Storage v. Great West Sav. & Loan (1985) 165 Cal.App.3d 1214, 212 Cal.Rptr. 232.) In fact, actual receipt of a notice of sale is not required by California law. The statutory provisions regarding non-judicial foreclosure sale simply mandate certain procedural requirements reasonably calculated to inform a borrower of a foreclosure sale, and that is all. (Lupertino v. Carbahal (1973) 35 Cal.App.3d 742, 747-748. 111 Cal.Rptr. 112) Because the wrongful acts alleged in Debtor's Complaint are not even "wrongful" or "improper" according to Federal Bankruptcy law or California law,

Debtor's Complaint must be dismissed with prejudice.

In fact, Debtor probably never had title to the subject property. In yet another Superior Court action involving Debtor and the subject property, the transfer of title to Debtor was rescinded. Thus, debtor never had title and is not entitled to it now. (See Supplemental Declaration of Dennis Roy, filed in connection with these Defendants' Motion for Relief, attached hereto as Exhibit "C", with exhibits, and incorporated herein by reference.)

V.

ACCORDING TO CALIFORNIA LAW, DEBTOR CANNOT SET ASIDE THE INVOLVED TRUSTEE'S SALE TO THESE DEFENDANTS

It is well-settled that a Bankruptcy Court must apply the law of a forum state in considering matters involving state law. United States v. Butner (1979) 440

U.S. 48, 59 S.Ct. 911.) In addition, when considering a motion to dismiss for failure to state a claim, a federal court must consider the law of the forum state in determining whether a claim for relief is property asserted. (Gay v. Heller (4th Cir. 1958) 252 F.2d 313, 317; Morgan v. American Family Life Assur. Co. of Columbus (D.Ct.Va. 1983) 559 F.Supp. 477, 480; McKenzie v. Fairmont Food Co., (D.C.N.D. Ohio 1969) 305 F.Supp. 163, 165; Copley v. Northwestern Mutual Life Ins. Co. (D.Ct.W.Va. 1968) 295 F.Supp.93,95.)

Pursuant to California law, a foreclosure sale to a bona fide purchaser for value and without notice may not be set aside. In Napue v. Gor-Mey West, Inc. (1985 2d. Dist., Div. 3) 175 Cal.App.3d 608, 220 Cal.Rptr. 799, 802, the Court of Appeal considered a Los Angeles Superior Court decision to set aside a foreclosure

sale. In reversing the trial court, the Court of Appeal specifically stated that:

> "In order to protect a purchaser of a property in a trustee's sale, section 294 provides that a recital in the deed executed pursuant to a power of sale that all procedural requirements have been complied with 'shall constitute prima facie evidence of compliance of such requirements and conclusive evidence thereof in favor of bona fide purchasers and encumbrancers for value and without notice.' Thus, any failure to comply with the procedural requirements of section 2924 will not affect the validity of the sale in favor of a bona fide purchaser. A sale to a bona fide purchaser is not voidable." [Emphasis added.]

These Defendants were clearly bona

fide purchasers as to the subject property. The instant bankruptcy case had not even been filed when the trustee's sale had occurred, Debtor's prior Chapter 11 case had been dismissed and a Judgment granting relief had been entered with respect thereto which authorized that sale, these Defendants were never even informed of the prior bankruptcy case nor any problems relating to Imperial's trust deed or foreclosure, and these Defendants paid the sum of $433,600.00 for the subject property which clearly constitutes the consideration required by California law. In addition, because no evidence has been presented nor allegations made to say that the trustee's sale was collusive, the bid price paid these Defendants is conclusive as to the value of the subject property. (In re Ehring, supra, 91 B.R. at 901; in re Verna, (Bk. C.D. Cal. 1986) 58 B.R. 246, 247, 252; In re

Madrid, (9th Cir. BAP 1982) 21 B.R. 424, 427.

The Trustee's Deed Upon Sale to those Defendants specifically stated regarding the foreclosure trustee, "All requirements of law regarding the mailing of copies of notices of default and related notices and the posting and publication of copies of the Notice of Sale have been complied with." (See Exhibit "6" to these Defendants' prior Motion for Relief.) By virtue of that statement, these Defendants are entitled to the conclusive presumptions set forth in California Civil Code Section 2924. That section specifically states that:

> "A recital in the deed executed (illegible) the publication of a copy of the notice of default or the personal delivery of the copy of the notice of default or the posting of copies of the notice of

sale or the publication of a copy thereof shall constitute prima facie evidence of compliance with such requirements and conclusive evidence thereof in favor of bona fide purchasers and encumbrancers for value and without notice."
(Emphasis added.)

These Defendants are clearly entitled to the conclusive presumptions as established by California Civil Code Section 2924. It cannot be disputed that these Defendants were bona fide purchasers without knowledge who paid reasonable and adequate value for the subject property.

In Wolfe v. Lipsy (1985 2d. Dist., Div. 7) 163 Cal.App.3d 633, 209 Cal.Rptr. 801, 805, the Court of Appeal reversed a Los Angeles Superior Court which had set aside a foreclosure sale. Relying on Section 2924, the Court of Appeal ex-

plained:

"Thus, Civil Code Section 2924 contains two presumptions. One is a rebuttable presumption where the recital in the trustee's deed upon sale is merely prima facie evidence of statutory compliance. (Evid. Code Section 602.) The other is a conclusive presumption where the trustee's sale involves a bona fide purchaser or encumbrancer for value and without notice. 'A conclusive presumption is one that requires that the trier of fact to find that the presumed fact that exists from a finding of the existence of the basic fact. The presumption is conclusive because the adverse party against whom it operated is not permitted to introduce evidence to contradict or rebut the existence of the presumed fact.' (Cita-

tions omitted.)" (Emphasis added.)
(See also, Napue v. Gor-Mey West, Inc., supra, 220 Cal.Rptr at 805; Little v. CFS Service Corp. (1987) 188 Cal.App.3d 1354, 233 Cal.Rptr. 923, 925; 1 Miller & Starr, Current Law of California Real Estate (1975), Section 3:125, p. 548 and cases cited at Fn. 7.)

Clearly, pursuant to a long line of California cases, the trustee's sale to these Defendants may not be set aside because they were bona fide purchasers for value. In addition, the conclusive presumptions set forth in Civil Code Section 2924 further preclude the setting aside of the trustee's sale. As such, Debtor's Complaint must be dismissed with prejudice.

VI.

CONCLUSION

Inasmuch as Debtor has no claim for relief or cause of action against these

answering Defendants pursuant to California law or pursuant to Federal Bankruptcy law, and probably never and is not entitled to title to the subject property, this Motion must be granted and Debtor's Complaint must be dismissed for failure to state any claim for relief against these answering Defendants. These answering Defendants respectfully request that this Court dismiss the Complaint, dismiss the Complaint with prejudice, render a determination in favor of these Defendants with respect to the Complaint, (illegible) the purposes and intents thereof), and that this Court order such other and further relief as it may deem just and proper.

DATED: December 28, 1989

Respectfully submitted,

RICH & EZER

By: /s/ Michael R. Sment

Attorneys for Defendants

DECLARATION OF MICHAEL R. SMENT

I, MICHAEL R. SMENT, hereby declare and state as follows:

1. As to the following facts, they are true and correct of my own personal knowledge except as to those facts stated on information and belief, which I am informed and believe to be true. If called upon to testify herein, I could and would testify competently to the following facts.

2. I am an attorney at law duly licensed to practice before this Court and all the courts of the State of California. I am a principal of Rich & Ezer, a professional corporation, which have been representing Defendants PAUL OSBORNE, WILLIAM LITTLE, DENNIS ROY, ARTHUR RITZ, JOSE J. CRUZ (erroneously sued herein as JOSE CRUZ), and RICHARD MARCZ (erroneously sued herein as RICHARD MARCY) ("these Defendants") herein. I am

the attorney most familiar with this matter and the ongoing bankruptcy litigation herein.

3. On November 3, 1989, these Defendants filed a Motion for Relief From Automatic Stay herein (Ref. No. M9-0419-JR). Attached to that Motion for Relief was a Declaration of Mitchell Ezer along with Exhibits "1" through "7". A true and correct copy of that Motion for Relief with attached exhibits is attached hereto collectively as Exhibit "B", with separate tabs for the seven exhibits originally attached. On November 24, 1989, the Defendants filed a Supplemental Declaration of Dennis Roy with (illegible) with this Court and they are true and correct copies thereof. This Court is therefore requested to take judicial notice of the Motion for Relief, the Supplemental Declaration and those exhibits, which are also admissible pursuant

to the Federal Rules of Evidence. This Court is also requested to take judicial notice of this Court's pleadings, records and files in connection with this bankruptcy case, this adversary proceeding, the Motion for Relief, and Debtor's prior Chapter 11 case (Bk. No. SA88-07521-JR).

4. On December 14, 1989, this Court entered a Judgment Order Vacating Automatic Stay with respect to these Defendants' Motion for Relief. This Judgment and Order specifically provides that the Automatic Stay in the above-entitled bankruptcy case "immediately vacated and extinguished for all purposes, effect November 23, 1989". It further provided that these Defendants were no longer restrained or stayed from taking any action or pursuing any litigation against, with or involving Debtor or the subject property. It also further provided that it would be binding upon

Debtor for 180 days from the date of the hearing (November 23, 1989) on the Motion for Relief. A true and correct ccpy of this Judgment and Order Vacating Automatic Stay is attached hereto as Exhibit "A", and incorporated herein by reference. This Court is requested to take judicial notice of this Judgment and Order, which is also admissible pursuant to Federal Rules of Evidence.

5. Prior to the filing of the Motion for Relief, I called Roy Woolsey, Debtor's counsel, and explained (illegible)

I declare under penalty of perjury according to the laws of the United States and State of California that the foregoing is true and correct.

Executed this 29th day of December 1989 at Los Angeles, California.

MICHAEL R. SMENT

EXHIBIT "A" TO DECLARATION OF SMENT IN SUPPORT OF MOTION TO DISMISS ETC.

FILED DEC 13 1989

* * *

UNITED STATES BANKRUPTCY COURT

CENTRAL DISTRICT OF CALIFORNIA

In Re	Bk. No. SA89-06771-JR
BFP, a Partnership,	CHAPTER 11
Debtor.	Ref. No. M9-0419-JR
JOSE J. CRUZ, RICHARD MARCZ, DENNIS ROY,	JUDGMENT AND ORDER VACATING AUTOMATIC STAY

* * *

Movants

vs.

BFP, a Partnership,

Respondent.

The Motion for Relief From Automatic Stay filed by Movants, JOSE J. CRUZ, RICHARD MARCZ, DENNIS ROY, ARTHUR RITZ, PAUL OSBORNE and WILLIAM LITTLE came on regularly for hearing on November 28, 1989 at 9:30 a.m. before the Honorable John Ryan, United States Bankruptcy

Judge, presiding. Movants appeared through their counsel, Michael R. Sment of Rich & Ezer. Respondent/Debtor BFP, a Partnership, appeared through Sheldon Foreman, who was specially appearing for Roy B. Woolsey, although no responsive or opposing pleadings were filed by or on behalf of Respondent/Debtor.

The Court having considered the pleadings and records on file herein, and the Supplemental Declaration of Dennis Roy, with good cause appearing therefor, makes its Judgment as follows:

IT IS HEREBY ORDERED, ADJUDGED AND DECREED that the Automatic Stay in the above-entitled bankruptcy case is immediately vacated and extinguished for all purposes, effective November 1989, as to Movants JOSE J. CRUZ, RICHARD MARCZ, DENNIS ROY, ARTHUR RITZ, PAUL OSBORNE and WILLIAM LITTLE. Movants are no longer restrained or stayed from taking any

action or pursuit of any litigation against, with or involving Respondent/Debtor to the real property generally described as 225 Via Genoa, Lido Isle, Newport Beach, California, and legally described on Exhibit "1" to the Motion for Relief which exhibit is incorporated herein by reference.

IT IS FURTHER HEREBY ORDERED, ADJUDGED AND DECREED that Judgment and Order Vacating Automatic Stay shall be binding on Respondent/Debtor in any bankruptcy proceedings filed by Respondent/Debtor within 180 days from the date of the hearing on Movant's Motion for Relief, and any such future Automatic Stay shall be null and void with respect to Movants, their assignees and/or successors-in-interest and/or their interest(s) in the subject property.

DATED: 13 DEC 1989

JOHN RYAN
UNITED STATES BANKRUPTCY JUDGE

EXHIBIT "B" TO SMENT'S DECLARATION IN SUPPORT OF MOTION TO DISMISS ETC.

FILED
1989 NOV 3 pm 4:05

* * *

UNITED STATES BANKRUPTCY COURT

CENTRAL DISTRICT OF CALIFORNIA

In Re	Bk. No. SA89-06771-JR
BFP, a Partnership,	CHAPTER 11
Debtor.	Ref. No. M9-0419-JR
JOSE J. CRUZ, RICHARD MARCZ, DENNIS ROY, ARTHUR RITZ, PAUL OSBORNE and WILLIAM LITTLE,	MOTION FOR RELIEF FROM AUTOMATIC STAY [11 U.S.C. 362(d)]; MEMORANDUM OF POINTS AND AUTHORITIES; DECLARATION OF MITCHEL E. EZER IN SUPPORT THEREOF
Movants,	Place: Courtroom 520
vs.	
BFP, a Partnership, Respondent.	

I.

STATEMENT OF FACTS

Movants complain and allege as follows:

1. That on or about October 25, 1988 at 1:40 p.m., Respondent/Debtor BFP,

a Partnership ("Respondent/Debtor" herein) filed a Chapter 11 Petition with this Court and commenced the above-entitled Bankruptcy case. As of at least November 2, 1989, no plan of reorganization has been filed herein, nor has a trustee been appointed herein.

2. Movants are uninformed as to the correct status or capacity of Respondent/Debtor inasmuch as Respondent/Debtor alleges that it is "a Partnership," without specifying whether it is a California general partnership, California limited partnership or some other partnership from some other state of the United States. Respondent/Debtor has alleged that it has been doing business in the County of Orange for at least the preceding 180 days.

3. That at all times material herein, Movants JOSE J. CRUZ, RICHARD MARCZ, DENNIS ROY, ARTHUR RITZ, PAUL

OSBORNE and WILLIAM LITTLE (collectively, "Movants" herein), were and are individuals residing in the State of California, and doing business in the County of Orange and/or the County of Los Angeles.

4. The real property which is the subject matter of this Motion, and upon which Respondent/Debtor does not do business or otherwise occupy, is generally described as 225 Via Genoa, Lido Isle, Newport Beach, California ("subject property" herein), is located in the County of Orange, State of California, and is legally described on Exhibit "1" which is attached hereto and incorporated herein by reference.

5. On August 18, 1989, Respondent/Debtor and others commenced an action in the Superior Court for the County of Orange (Case No. 600205) against Movants and Imperial Savings to quiet title, for declaratory relief, to

impress a trust and for damages in connection with the subject property. A true and correct copy of the Superior Court Summons and Complaint are attached hereto collectively as Exhibit "2" and incorporated herein by reference. In connection with the filing of this action, Respondent/Debtor and others also recorded a Notice of Pending Action against the subject property. On or about October 12, 1989, Movants filed a Demurrer to the Superior Court Complaint along with a Motion for Order Expunging the Lis Pendens, with a hearing scheduled on the Demurrer and the Motion for October 1989 at 9:30 a.m. in Department 23 of the Superior Court. True and correct copies of the Demurrer and Motion to Expunge (with exhibits) are attached hereto as Exhibits "3" and "4", respectively, and incorporated herein by reference. On October 25, 1989 -- less than

two days before that scheduled hearing, and apparently to avoid an undesirable outcome in the Superior Court action -- Respondent/Debtor commenced the instant bankruptcy case. That hearing has been continued by the Superior Court to November 14, 1989.

6. This is at least the second bankruptcy case involving Respondent/Debtor filed within this Court within the past ten months. On or about December 21, 1988, an involuntary Chapter 11 Petition was filed against Respondent/Debtor in this Court (Bk. No. SA 88-07521-JR).

7. Imperial Savings Association ("Imperial" herein) (a defendant in the pending Superior Court action) was the beneficiary of a first trust deed encumbering the subject property. Pursuant to a Judgment and Order Vacating Automatic Stay entered by this Court on

June 14, 1989, Imperial obtained relief from Automatic Stay in that prior Chapter 11 case to proceed with a foreclosure and hold a trustee's sale of the subject property. A true and correct copy of that Judgment is attached hereto as Exhibit "5" and incorporated herein by reference.

8. Pursuant to an Order entered on June 14, 1989, the prior Chapter 11 Involuntary Petition was dismissed.

9. Pursuant to the Judgment and Order Vacating Automatic Stay, on July 12, 1989 -- over 3-1/2 months prior to the filing of this Bankruptcy case -- the subject property was sold at a scheduled Trustee's Sale, conducted on behalf of Imperial, to Movants for the sum of $433,600.00. A Trustee's Deed Upon Sale was issued on July 18, 1989, and recorded on July 21, 1989, as Instrument No. 89-385080 with the Official Records of Orange County. A true and correct copy

of that Trustee's Deed is attached hereto as Exhibit "6" and incorporated herein by reference. Pursuant to California law, title to the subject property became vested in Movants upon the delivery and execution of the Trustee's Deed.

10. On or about July 14, 1989, Respondent/Debtor and others filed a previous action in the Superior Court for the County of Los Angeles (Case No. 596890) in which they attempted to attack the validity of the trustee's sale. After discussions with Movant DENNIS ROY; that previous action was dismissed, a lis pendens recorded in connection therewith was withdrawn and the occupant of the subject property (Sheldon Foreman) voluntarily vacated it and surrendered it to Movants. A true and correct copy of the Declaration of DENNIS ROY (filed in support of Movant's Motion to Expunge) in this regard is attached hereto (without

exhibits) to Exhibit "7" and incorporated herein by reference.

11. Respondent/Debtor clearly voluntarily commenced the pending Superior Court action and prior Superior Court action. The instant Bankruptcy filing was apparently caused by Movant filing of their Demurrer and their Motion to Expunge, which contained significant California authorities indicating that involved trustee's sale cannot be set aside under California state law. Respondent/Debtor clearly became concerned with the scope, effect and significance of these authorities, and commenced the instant bankruptcy case to avoid the hearings on the Demurrer and the Motion to Expunge. The Demurrer and Motion to Expunge were filed (as required) as Movants' first response and defense to the Superior Court action. It is clearly unreasonable and inequitable to allow

Respondent/Debtor to commence and prosecute a state court action, and then file this Bankruptcy case to obtain an Automatic Stay to use as a sword to prevent Movants and other defendants from legitimately defending or responding to that action, thus resulting in an unfair and inequitable advantage to Respondent/Debtor. Respondent/Debtor's conduct appears to be even more improper and inequitable considering the fact that it obtained a dismissal of a prior Chapter 11 Petition and case only approximately 3-1/2 months

12. It would also appear that the instant Bankruptcy case was not filed for a proper bankruptcy purpose or within the meaning and intent of the United States Bankruptcy Code. Respondent/Debtor's Schedule B filed herein states that "The foreclosure sale is subject to being set aside in that the sale was for less than

a reasonable equivalent value." Movants contend, however, that the current law and authorities in the Ninth Circuit do not permit foreclosure sales to be set aside on that basis. In fact, Movants contend that the applicable law and authorities in the Ninth Circuit would preclude the involved petition foreclosure sale from being affected at all by this Bankruptcy case and would also require a finding that the purchase price paid at the foreclosure sale constituted the reasonable equivalent value of the subject property.

13. Movants allege that Respondent/Debtor's filing of instant Bankruptcy case is a delay tactic to prevent the hearing on Movants' Demurrer and Motion to Expunge, originally scheduled for October 27, 1989 and now continued to November 14, 1989. Otherwise, there can be no explanation for Respondent/Debtor's

delay in commencing this Bankruptcy case over 3-1/2 months after the involved foreclosure sale occurred, as opposed to filing a case within a short time after that sale. In addition, there can be no explanation for why Respondent/Debtor filed or commenced the Superior Court action, and then commenced this Bankruptcy case approximately 60 days later, except for an inexcusable attempt to avoid Movants' legitimate and properly filed Demurrer and Motion. Inasmuch as this Court must follow California state law as to foreclosure sales, and inasmuch as the Ninth Circuit Court of Appeals and Bankruptcy Appellate Panel for the Ninth Circuit have indicated that pre-petition foreclosure sales may not be set aside under the Bankruptcy Code, the filing and prosecution of the instant Chapter 11 case clearly constitutes an abuse and misuse of this Bankruptcy Court, the

United States Bankruptcy Code and the bankruptcy system in general. This Court should not condone such action or conduct in an already over-crowded and congested court system.

14. By this Motion, Movants seek relief from the Automatic Stay in the above-entitled bankruptcy case for all purposes, or in the alternative, for authority to continue with the prosecution, discovery, defense and litigation in the pending Superior Court action up to and including a final judgment and/or oppose any appeals by Respondent/Debtor or others. Under the latter alternative, if a judgment or judgments for money, damages or costs are rendered against Respondent/Debtor in the Superior Court or otherwise, Movants will return to this Court for further order(s) before proceeding with any execution on or collection of any such judgment(s).

15. The granting of such relief to Movants would not act as the detriment or prejudice of this Court, any creditors, Respondent/Debtor or any party involved in the above-entitled bankruptcy case. In view of at least the two Superior Court actions filed by Respondent/Debtor against Movants, the time, effort and funds expended with respect thereto, the fact that the Superior Court actions contend that the foreclosure sales were conducted in violation of California law, the fact that this court must be controlled by California law with respect thereto, and in view of the fact that the Superior Court was (and now is) set to hear the Demurrer and Motion to Expunge, it would be totally inequitable and unfair not to grant the relief sought by Movants herein.

16. This court has jurisdiction over this action pursuant to the provi-

sions of Title 28 U.S.C. Section 1334, Title 28 U.S.C. Section 157(b)(2)(G) and Title 11 U.S.C. Section 362(d). The underlying Bankruptcy case is Case No. SA 89-06771-JR, which is now pending in his Court and District.

17. PLEASE TAKE NOTICE that the Local Rules of the United States Bankruptcy Court require that all Respondents file a formal response to this Motion at least five court days prior to the scheduled hearing on this Motion.

18. Pursuant to the Federal Rules of Evidence and other applicable authorities, Movants request this Court to take judicial notice of the pleadings, recorded instruments and other writings attached hereto as exhibits.

II.

POINTS AND AUTHORITIES

Section 362(d) of the United States Bankruptcy Code provides, in pertinent

part, that:

"(d) On request of a party in interest and later notice and a hearing, the court shall grant relief from the stay provided under subsection (a) of this section, such as by terminating, annulling, modifying, or conditioning such stay --

(1) for cause, including the lack of adequate protection of an interest in property of such party in interest; or

(A) the debtor does not have an equity in such property; and

(B) such property is not necessary to an effective reorganization." (Emphasis added.)

The Bankruptcy Court in in Re Philadelphia Athletic Club, 9 B.R. 280, 282 (1981 Bk. E.D. Penn.) granted relief from the automatic stay so that a Plaintiff could proceed with its state

court action against the debtor and stated:

"At the present, the state court plaintiff has only an unliquidated claim against the debtor. That claim must be liquidated in order for the debtor's case under Chapter 11 to proceed. The question is what will be the most expeditious and fair way to liquidate that claim. In the instant case there have already been lengthy proceedings in the state court. To require the state court plaintiff to start those proceedings all over again in this court would clearly be a waste of judicial and legal time and effort. Since the court state action is almost at an end, the most expeditious way to liquidate the claim of the plaintiff is to permit the state court action to be

concluded. This will cause the least delay and expense for all concerned."

The Court also cited Collier on Bankruptcy in noting that relief from the automatic stay under Section 362(d)(1) may be granted for cause including a situation here:

"[T]he liquidation of a claim may be more conveniently and speedily determined in another form [sic. forum?]. 2 Collier on Bankruptcy Section 362.07(3) 15th ed. 1980) (Footnotes omitted." (Id.)

The Bankruptcy Court in In re Central Hobron Assoc., 36 B.R. 106, 108 (1983 Bk. Haw.), also granted relief from the automatic stay so that a state court action could continue against the debtor. The Court noted that:

"Since Plaintiffs only seek to resolve the matter of Debtor's

liability under the letter agreement of December 12, 1980 and do not seek to enforce any judgment against Debtor's estate, the Court finds that the lifting of the stay will expedite resolution of the two cases without multiplicity of suit and without interference of the administration of Debtor's estate." (See also, In Re Hunter, 32 B.R. 140, 142 (1983 Bk. S.D. Flor.); In Re Frigitemp Corp., 8 B.R. 284, 288-290 (S.D.N.Y. 1981).)

11 U.S.C. Section 547 does not convey any right or power to a debtor to invalidate or set aside a pre-petition foreclosure sale. (In Re Ehring, (1988 9th Cir. BAP) 91 B.R. 897, 900.)

11 U.S.C. Section 548 does not convey any right or power to a debtor to invalidate or set aside a pre-petition foreclosure sale. (In Re Madrid (1984 9th

Cir. BAP) 725 F.2d 1197, 1200-01.)

State substantive law must be followed by a federal bankruptcy court. (Butner v. U.S. (1979) 440 U.S. 48, 99 S.C. 914.)

Pursuant to California law, a foreclosure sale to a good faith purchaser who pays valuable consideration may not be set aside. (Calif. Civil Code Section 2924; Napue v. Gor-May West, Inc. (1985) 175 Cal.App.3d 608, 220 Cal.Rptr. 799, 802; Wolfe v. Lipsy, (1985) 163 Cal.App.3d 633, 209 Cal.Rptr. 801, 805.)

III.

CONCLUSION

WHEREFORE, Movant moves for a Judgment and/or Order from this Court as follows:

1. For a Judgment and/or Order granting Movants, their agents, assignees and/or successor-in-interest complete relief from the Automatic Stay in the

above-entitled Bankruptcy case for all purposes, or granting a modification or conditioning of the Automatic Stay, so that defense of, and litigation and discovery in the pending Orange County Superior Court Action (Case No. 600205) or any companion or related proceeding(s)/actions/appeals thereto, may be totally continued against Respondent/Debtor for any and all purposes;

2. In the alternative, for Judgment and/or Order granting Movants, their agents, assignees and/or successor-in-interest complete relief from the Automatic Stay in the above entitled Bankruptcy case, or modifying or conditioning the Automatic Stay, so that defense of, and litigation and discovery in the pending Orange County Superior Court Action (Case No. 600205), or any companies or related proceedings(s)/ actions/ appeals thereto, may be continued against

Respondent/Debtor and including a final judgment and/or opposing any appeals by Defendants;

3. For such other Judgment(s) and/or Order(s) regarding the adequate protection of Movants' interest in the subject property, the pending Superior Court action or any other acts, proceedings or matters, or of an equitable nature, as this Court deems appropriate and just;

4. For attorneys' fees and./or costs of suit incurred herein, or any other appropriate sanctions, in accord with United States Bankruptcy Code, local and Federal Bankruptcy Rules, the underlying agreements between Movants and Respondent/Debtor and its related entities, and all other applicable rules, statutes, regulations, and/or principles of equity;

5. For such other and further

relief as this Court may deem just and proper.

DATED: November 1, 1989

Respectfully submitted,

RICH & EZER

MICHAEL R. SMENT

DECLARATION OF MITCHEL J. EZER

I, MITCHEL J. EZER, declare and state as follows:

1. As to the following facts, I know them to be true of my own knowledge and, if called upon to testify herein, I could and would testify competently to those facts:

2. I am an attorney duly licensed to practice in all the courts of the Stat of California and in the Central District of the United States District Court. I am a principal in the law firm of Rich & Ezer, a Professional Law Corporation, attorney for Movants, JOSE CRUZ, RICHARD MARCZ, DENNIS ROY, ARTHUR RITZ, PAUL OSBORNE and WILLIAM LITTLE (collectively, "Movants" herein. I am the attorney with our firm most familiar with the pending state court litigation involving Respondent/Debtor BFP, a Partnership ("Respondent/Debtor" herein) and Movants.

3. That on or about October 25, 1988 Respondent/Debtor BFP, a Partnership ("Respondent/Debtor" herein) filed a Chapter 11 Petition with this Court and commenced the above-entitled Bankruptcy case. As of at least November 2, 1989, no plan or reorganization has been filed herein, nor has a trustee been appointed herein.

4. Movants are uninformed as to the correct status of capacity of Respondent/Debtor inasmuch as Respondent/Debtor alleges that it is "a Partnership" without specifying whether it is a California general partnership, California limited partnership or some other partnership from some other state of the United States. Respondent/Debtor has alleged that it has been doing business in the County of Orange for at least the preceding 180 days.

5. That at all times material

herein, Movants JOSE J. CRUZ, RICHARD MARCZ, DENNIS ROY, ARTHUR RITZ, PAUL OSBORNE and WILLIAM LITTLE (collectively, "Movants" herein), were and are individuals residing in the State of California, and doing business in the County of Orange and/or the County of Los Angeles.

6. The real property which is the subject matter of this Motion, and upon which Respondent/Debtor does not do business otherwise occupy, is generally described as 225 Via Genoa, Lido Isle, Newport Beach, California ("subject property" herein), located in the County of Orange, State of California, and is legally described on Exhibit "1" which is attached hereto and incorporated herein by reference.

7. On August 18, 1989, Respondent/Debtor and others commenced an action in the Superior Court for the County of

Orange (Case No. 600205) against Movants and Imperial Savings to quiet title, for declaratory relief, to impress a trust, and for damages in connection with the subject property. A true and correct copy of the Superior Court Summons and Complaint are attached hereto collectively as Exhibit "2" and incorporated herein by reference. In connection with the filing of this action, Respondent/Debtor and others also reversed a Notice of Pending Action against the subject property. On or about October 12, 1989 Movants filed a Demurrer to the Superior Court Complaint along with a Motion For Order Expunging the Lis Pendens, with a hearing scheduled on the Demurrer and the Motion for October 27, 1989 at 9:30 a.m. in Department 23 of the Superior Court. True and correct copies of the Demurrer and Motion to Expunge (without exhibits) are at-

tached hereto as Exhibits "3" and "4", respectively, and incorporated herein by reference. On October 25, 1989 -- less than two days before that scheduled hearing, and apparently to avoid an undesirable outcome in the Superior Court action -- Respondent/Debtor commenced the instant bankruptcy case. That hearing has been continued by the Superior Court to November 14, 1989.

8. This is at least the second bankruptcy case involving Respondent/Debtor filed with this Court within the past ten months. On or about December 21, 1988, an involuntary Chapter 11 Petition was filed against Respondent/Debtor in this Court (Bk. NO.SA 88-07521-JR).

9. Imperial Savings Association ("Imperial" herein) (a defendant in the pending Superior Court action) was the beneficiary of a first trust deed

encumbering the subject property. Pursuant to a Judgment and Order Vacating Automatic Stay entered by this Court on June 15, 1989, Imperial obtained relief from Automatic Stay in that prior Chapter 11 case to proceed with foreclosure and hold a trustee's sale of the subject property. A true and correct copy of that Judgment is attached hereto as Exhibit "5" and incorporated herein by reference.

10. Pursuant to an Order entered on June 14, 1989, the prior Chapter 11 Involuntary Petition was dismissed.

11. Pursuant to the Judgment and Order Vacating Automatic Stay, on July 12, 1989 -- over 3-1/2 months prior to the filing of this Bankruptcy case -- the subject property was sold at a scheduled Trustee's Sale, conducted on behalf of Imperial, to Movants for the sum of $433,000.00. A Trustee's Deed Upon Sale

was issued on July 18, 1989, and recorded on July 21, 1989, as Instrument No. 89-385080 with the Official Records of Orange County. A true and correct copy of that Trustee's Deed is attached hereto as Exhibit "6" and incorporated herein by reference. Pursuant to California law, title to the subject property became vested in Movants upon the delivery and execution of the Trustee's Deed.

12. On or about July 14, 1989, Respondent/Debtor and others filed a previous action in the Superior Court for the County of Los Angeles (Case No. 596890) in which they attempted to attack the validity of the trustee's sale. After discussions with Movant DENNIS ROY, that previous action was dismissed, a lis pendens recorded in connection therewith was withdrawn and the occupant of the subject property (Sheldon Foreman) voluntarily vacated it and surrendered it to

Movants. A true and correct copy of a Declaration by DENNIS ROY (filed in support of Movant's Motion to Expunge) in this regard is attached hereto (without exhibits) as Exhibit "7" and incorporated herein by reference.

13. Respondent/Debtor clearly voluntarily commenced the pending Superior Court action and prior Superior Court action. The instant Bankruptcy filing was apparently caused by Movant filing of their Demurrer and their Motion to Expunge, which contained significant California authorities that the involved Trustee's sale cannot be set aside under California state law. Respondent/Debtor clearly became concerned with the scope, effect and significance of these authorities, and commenced the instant bankruptcy case to avoid the hearing on the Demurrer or Motion to Expunge. The Demurrer and Motion to Expunge were filed

(as required) as Movants' first response and defense to the Superior Court action. It is clearly unreasonable and inequitable to allow Respondent/Debtor to commence and prosecute a state court action, and then file this Bankruptcy case to obtain an Automatic Stay to use as a sword to prevent Movants and other defendants from legitimately defending or responding to that action, thus resulting in an unfair and inequitable advantage to Respondent/Debtor. Respondent/Debtors conduct appears to be even more improper and inequitable considering the fact that it obtained a dismissal of a prior Chapter 11 Petition and case only approximately 3-1/2 months

14. It would also appear that the instant Bankruptcy case was not filed for a proper bankruptcy purpose or within the meaning and intent of the United States Bankruptcy Code. Respondent/Debtor's

Schedule B filed herein states that "the foreclosure sale is subject to being set aside in that the sale was less than a reasonable equivalent value." Movants contend, however, that the current law and authorities in the Ninth Circuit do not permit foreclosure sales to be set aside on that basis. In fact, Movants contend that the applicable law and authorities in the Ninth Circuit would preclude the involved petition foreclosure sale from being affected at all by this Bankruptcy case and would also require a finding that the purchase price paid at the foreclosure sale constituted the reasonable equivalent value of the subject property.

15. Movants allege that Respondent/ Debtor's filing of the instant Bankruptcy case is a delay tactic to prevent the hearing on Movant's Demurrer and Motion to Expunge, originally scheduled for

October 27, 1989, and now continued to November 14, 1989. Otherwise, there can be no explanation for Respondent/Debtor's delay in commencing this bankruptcy case over 3-1/2 months after the involved foreclosure sale occurred, as opposed to filing a case within a short time after that sale. In addition, there can be no explanation for why Respondent/Debtor filed or commenced the Superior Court action, and then commenced this Bankruptcy case approximately 60 days later, except for an inexcusable attempt to avoid Movants; legitimate and properly filed Demurrer and Motion. Inasmuch as this Court must follow California state law as to foreclosure sales, and inasmuch as the Ninth Circuit Court of Appeals and Bankruptcy Appellate Panel for the Ninth Circuit have indicated that pre-petition foreclosure may not be set aside under the Bankruptcy Code, the filing and

prosecution of the instant Chapter 11 case clearly constitutes abuse and misuse of this Bankruptcy Court, the United States Bankruptcy Code and the bankruptcy system in general. This Court should not condone such action or conduct in an already overcrowded and congested court system.

I declare under penalty of perjury according to the laws of the United States and the State of California that the foregoing is true and correct.

Executed this 2nd day of November, 1989 at Los Angeles, California.

/s/ Mitchel J. Ezer
MITCHEL J. EZER

EXHIBIT "1"

LEGAL DESCRIPTION

Lots 946 and 947 of Tract No. 907, in the City of Newport Beach, County of Orange, State of California, as shown on a map recorded in Book 28, pages 25 to 35 inclusive, of Miscellaneous Maps, in the office of the County Recorder of said County together with the Northwesterly 17 feet of that portion of Via Genoa adjoining said land on the Southeast abandoned by resolution of the City Council of the City of Newport Beach, a certified copy of which resolution was recorded June 10, 1953 in Book 2518, Page 348, Official Records.

EXHIBIT "2"

FILED

AUGUST 18, 1989

* * *

IN THE SUPERIOR COURT OF CALIFORNIA

IN AND FOR THE COUNTY OF ORANGE

SHELDON L. FOREMAN;	CASE NO. 600205
BFP, a Partnership, composed of WAYNE L. PEDERSEN, MARLENE PEDERSEN and RUSSELL J. BARTON; RUSSELL J. BARTON,	COMPLAINT TO QUIET TITLE, FOR DECLARATORY RELIEF, TO IMPRESS A TRUST, AND FOR DAMAGES
Plaintiffs,	
vs.	
IMPERIAL SAVINGS & LOAN ASSOCIATION, a California corporation; PAUL OSBORNE;	
* * *	
Defendants.	

Plaintiffs allege that:

COMMON ALLEGATIONS

1. At all times herein from August 27, 1987 to the end of 1987, BFP was a partnership composed of WAYNE L. PEDERSEN, MARLENE PEDERSEN, who is also known as MARLENE M. PEDERSEN, plaintiff RUSSELL J. BARTON, WAYNE PEDERSEN AND MARLENE PEDERSEN assigned their interest to OFF-ROAD VEHICLES - RECREATION FAMILY CAMP-GROUND, INC. Subject to the effect of that assignment, it is a co-partnership.

2. At all times since September 29, 1987, defendant IMPERIAL SAVINGS & LOAN ASSOCIATION has been and now is a corporation organized and existing under the laws of the state of California.

3. Defendants PAUL OSBORNE, WILLIAM LITTLE, DENNIS ROY, ARTHUR RITZ, JOSE CRUZ, RICHARD MARCY, and Does 1 to 10, purchased the real property described on Exhibit A at a Trustee's Sale and Does 1 to 10 are successors in interest of some interest therein.

4. The true names and capacities, whether individual, corporate, associate, or otherwise of defendants named herein as Does 1 though 10, inclusive, are unknown to plaintiff, who therefore sues said defendants by such fictitious names. Plaintiff will ask leave of court to amend this Complaint to show the true names and capacities of such defendants when the same have been ascertained.

5. At all times prior to July 29, 1989, ANN FANT FOREMAN and plaintiffs BFP and SHELDON L. FOREMAN have been and were in open, notorious, conspicuous and exclusive possession of said real property and defendants, and each of them, had notice of the rights and claims of said BFP, SHELDON L. FOREMAN and ANN FANT FOREMAN.

6. At all times herein mentioned, prior to the recording on August 25, 1987, of the deed hereinafter referred to

executed by SHELDON L. FOREMAN and ANN FANT FOREMAN, they owned the real property in the City of Newport Beach, County of Orange, described as Exhibit "A", attached hereto and hereby incorporated herein.

7. On or about July 18, 1987, plaintiff RUSSELL J. BARTON and WAYNE L. PEDERSEN and MARLENE M. PEDERSEN, orally agreed and agreed in writing that WAYNE L. PEDERSEN be the buyer of said real property, that said WAYNE L. PEDERSEN give an option to said plaintiff to purchase said real property during the period of One Hundred Eighty (180) days from the date of recordation of the deed describing said real property, for a sum equal to indebtedness secured by said real property consented to by RUSSELL J. BARTON, that defendants not convey or encumber said real property otherwise during said option period without consent

of plaintiff RUSSELL J. BARTON that if said plaintiff exercise said option he pay 25% of profits to said WAYNE L. PEDERSEN.

8. On or about August 3, 1987, plaintiff SHELDON L. FOREMAN and ANN FANT FOREMAN and WAYNE L. PEDERSEN made, executed and delivered escrow instructions in and by which they named Cress Escrow Corporation in Irvine, California, as the holder and agreed to the sale of said real property by said plaintiffs and purchase of it by said WAYNE L. PEDERSEN. WAYNE L. PEDERSEN promised, represented, warranted and agreed to deliver to plaintiff, Three Hundred Fifty-Six Thousand, Two Hundred Fifty ($356,250.00) Dollars being the proceeds of a loan to be secured by the first trust deed describing said property, securing a note for approximately Three Hundred Fifty Six Thousand, Two Hundred Fifty ($356,250.00)

Dollars and certain rare coins to be delivered.

9. Thereafter, the parties to said escrow amended the Escrow Instructions to provide that said Marlene Pedersen be a party as a buyer.

10. During August of 1987, newspapers stated that WAYNE L. PEDERSEN was under investigation for alleged fraudulent sales of rare coins and plaintiff SHELDON L. FOREMAN and ANN FANT FOREMAN voiced to WAYNE L. PEDERSEN concerns regarding the same; the parties to the escrow orally agreed that in place of the rare coins, a partnership be formed, that WAYNE L. PEDERSEN AND MARLENE M. PEDERSEN deed to it and it make, execute and deliver a note and a trust deed describing said real property and plaintiff SHELDON L. FOREMAN and ANN FANT FOREMAN as beneficiaries to secure said note that said note be payable to SHELDON

L. FOREMAN and ANN FANT FOREMAN in the sum of Two Hundred Thousand Dollars ($200,000.00), and WAYNE L. PEDERSEN and MARLENE M. PEDERSEN promised, represented, warranted and agreed that they would deliver such note and trust deed, that the escrow close, and that plaintiff SHELDON L. FOREMAN and ANN FANT FOREMAN may remain in possession of said real property until delivery of said Two Hundred Thousand Dollars ($200,000.00) note and trust deed in good and sufficient form and recording thereof and until RUSSELL J. BARTON was ready to commence remodeling; later, in August, the parties orally agreed that WAYNE L. PEDERSEN and MARLENE M. PEDERSEN deed to BFP and that BFP execute the trust deed naming SHELDON L. FOREMAN and ANN FANT FOREMAN as beneficiaries.

11. Pursuant to said oral agreement, the following occurred and docu-

ments which were recorded were recorded in the Official records of Orange County:

A. A deed dated August 12, 1987, describing SHELDON L. FOREMAN and ANN FANT FOREMAN as grantors, WAYNE L. PEDERSEN and MARLENE M. PEDERSEN as grantees and describing said real property. Said deed was recorded on August 25, 1987 as Instrument No. 87-481934.

B. A deed of trust describing WAYNE L. PEDERSEN and MARLENE M. PEDERSEN as trustors, L. C. Service Corporation trustee, Loan Marketing and Brokers Services, Inc., beneficiary, and describing said real property, securing a note for Three Hundred Fifty-Six Thousand Two Hundred Fifty Dollars ($356,250.00) and interest at 12% per annum, principal and interest payable Three Thousand Six Hundred Sixty-four and 44/100 Dollars ($3,604.44) on the first day of each month beginning October 1, 1987. Said

trust deed was recorded on August 5, 1987 as Instrument No. 87-431935. Said trust deed was assigned by said Loan Marketing and Brokers Services, Inc., to Abbey Mortgage Corporation by assignment recorded August 25, 1987, as Instrument No. 87-841936, and by it to Imperial Savings Association by assignment recorded August 25, 1987 as Instrument No.87-841937.

C. On or about August 26, 1987, plaintiff RUSSELL J. BARTON and WAYNE L. PEDERSEN and MARLENE PEDERSEN made, entered into and delivered a partnership agreement dated August 26, 1987, whereby BFP, a partnership, is formed.

D. A deed dated August 27, 1987 describing WAYNE L. PEDERSEN and MARLENE M. PEDERSEN, as grantors, plaintiff BFP, a general partnership, as the grantee, and said real property was recorded on September 16, 1987, as Instrument No. 87-524675. On September 11, 1986, Randy

Jones, being duly sworn, said to Patrick Wruck, notary, that he saw said grantors execute and deliver said deed.

E. On August 27, 1987, plaintiff B.F.P. made, executed and delivered a deed of trust naming SHELDON L. FOREMAN and ANN FANT FOREMAN as beneficiaries and describing said real property securing a note for Two Hundred Thousand Dollars ($200,000.00). Deed of trust was fully recorded on September 16, 1987 as Instrument No.87-524676. A copy of said deed of trust is marked Exhibit A and attached hereto. In and by said trust deed, it was agreed that in the event of a lawsuit between the parties, the prevailing party would be entitled to reasonable attorney's fees. Said note provided that interest at 10% per annum be paid monthly beginning September 27, 1987, and principal be dean or before February 27, 1988.

12. Plaintiffs performed all of the

covenants and obligations to be performed by them in said agreements, including said purchase agreement, said partnership agreement, and the escrow instructions as amended.

13. On or about September 29, 1987, without the consent, permission or approval and without prior knowledge of plaintiffs WAYNE L. PEDERSEN an MARLENE M. PEDERSEN made, executed and delivered a deed whereby they purported to convey said property to OFF-ROAD VEHICLES-RECREATION & FAMILY CAMPGROUND, INC., a California corporation. A copy of said deed is attached hereto as Exhibit B but incorporated herein by reference. At the time of the making and acceptance of said deed, the grantee knew and should have known of plaintiffs' possession of and claims to said real property.

14. No payments have been made on either of the notes secured by trust

deeds on said real property except the payment by SHELDON L. FOREMAN on the note secured by the first trust deed in order to reinstate it during 1988.

15. In 1988, after plaintiff SHELDON L. FOREMAN had reinstated the note secured by the first trust deed and while plaintiffs BFP and SHELDON L. FOREMAN litigated their claims against OFF-ROAD VEHICLES - RECREATION & FAMILY CAMPGROUND, INC., defendant IMPERIAL SAVINGS & LOAN ASSOCIATION caused to be given a notice of default under the first deed of trust and thereafter noticed sale to take place in December of 1988. The notice of sale stated that the sale would be for cash and designated no equivalents allowed by Section 2924(b) of the California Civil Code. A copy of the notice is marked as Exhibit C and incorporated herein.

16. In December of 1988, OFF-ROAD

VEHICLES - RECREATION & FAMILY CAMP-GROUND, INC., filed an involuntary Petition Under Chapter 11 of the U. S. Bankruptcy Code alleging that BFP, a Partnership, was insolvent. Sid petition was filed in the U. S. Bankruptcy Court for the Central District of California sitting in Santa Ana No. SA-88-07521-JR.

17. In said petition, it was alleged that BFP's address was 3303 F-1 Harbor Blvd., Costa Mesa, California. BFP, a partnership, filed a response to said petition and showed in the upper left-hand corner of the first page that it was filed in pro per and that its address was 3051 Yukon Circle, Costa Mesa, California 92626.

18. At a hearing in connection with the petition for adjudication under Chapter 11 held on or about May 11, 1988, counsel for IMPERIAL SAVINGS & LOAN ASSOCIATION appeared at the hearing and knew

at that time in that hearing that BFP was present by its general partner, RUSSELL BARTON, and by a claimed partner, OFF-ROAD VEHICLES, by its president, GARY HENIG, and its counsel, Armando Lopez, and BFP and RUSSELL BARTON were present by their counsel, Roy B. Woolsey.

19. At said time and place, plaintiffs BFP and SHELDON L. FOREMAN and ANN FANT FOREMAN requested that the sale on foreclosure be continued until after July 17, 1989, the date on which the quiet title action in the state court determining title to said real property was set for trial. Defendant, IMPERIAL SAVINGS & LOAN ASSOCIATION stated that it would not conduct the sale until it got a copy of the order, meaning a copy of the order of the Bankruptcy Court on the pending petition for adjudication under Chapter 11.

20. On or about May 10, 1989,

defendant IMPERIAL SAVINGS & LOAN ASSOCIATION filed in said matter a Motion for an Order Granting Relief from the Automatic Stay and, thereafter, on May 22, 1989, caused to be executed an affidavit of service stating that the services of a copy of the notice of motion, together with a motion and declaration was served on BFP, a Partnership, by mailing to 3303 F-1 Harbor Boulevard, Costa Mesa, California.

21. BFP had not been at 3303 F-1 Harbor Boulevard, Costa Mesa, California for over a year and all of the parties hereto knew that it was the policy of the United States post office not to forward mail for more than one year from the time of a change of address.

22. No copy of said notice of motion, motion or declaration was ever received by BFP, and plaintiffs are informed and believe and, based upon said

information and belief allege, that the envelope containing the notice of hearing, motion, and declaration was returned to the office of counsel for defendant, Imperial Savings Association, and that defendant did not know that said motion had been filed and concealed those facts from plaintiffs.

23. Said notice stated that there would be a hearing on said motion on June 12, 1989. Thereafter, the Bankruptcy Court, not realizing that BFP had not been served, made an order granting said motion. Notwithstanding that BFP had not appeared at said hearing and had no knowledge thereof, IMPERIAL SAVINGS & LOAN ASSOCIATION forwarded a Judgment and Order Vacating the Automatic Stay to the Bankruptcy Court together with an affidavit that BFP was served by mailing to 3033 F-1 Harbor Blvd., Santa Ana, California. Said copies allegedly so served

were never received by plaintiffs, or any of them. Plaintiffs are informed and believe, and based upon such information and belief allege, that the post office returned the same to counsel for IMPERIAL SAVINGS and that IMPERIAL SAVINGS knew that said order was entirely without notice to or knowledge of the plaintiffs.

24. In 1988, plaintiff SHELDON L. FOREMAN paid $32,000.00 to Imperial Savings to reinstate the trust deed and note and from time to time to discuss the pendency of the foreclosure sale with Imperial and that told plaintiff that he would reinstate, but not until the last minute, hoping that the matter of title had been determined between him and Off-Road Vehicles.

25. Plaintiffs are informed and believe, and based thereon allege, that in May of 1989, defendant IMPERIAL SAVINGS informed an agent of plaintiffs that

said defendant would give notice of the foreclosure sale it if was to occur, and it did not do so. The beneficiaries under the deed of trust led plaintiffs to believe that there would be no foreclosure sale until after what was determined in the Superior Court trial then set for July 17, 1989, and plaintiffs believed there would be no sale until after July 17, 1989. The trustee under the deed of trust promised a notice of continuance of the sale but did not provide the same and by reason thereof the sale was invalid.

26. Plaintiff SHELDON L. FOREMAN and ANN FANT FOREMAN had heard from said agent and reasonably understood and believed that the sale would not take place until after the trial of the quiet title action then scheduled for July 17, 1980.

27. Without any notice to plaintiffs, said sale was conducted on or

about July 12, 1989. Said property was then worth over $725,000.00. Defendants, PAUL OSBORNE, WILLIAM LITTLE, DENNIS ROY, ARTHUR RITZ, JOSE CRUZ and RICHARD MARCY, who were the purchasers at the sale, bid $433,000.00 for said property.

28. Plaintiffs are informed and believe, and based upon such information and belief allege, that said $433,000.00 was not paid on the date of the sale in cash or any equivalent of cash, but that the same was paid later. At no time did plaintiffs consent to any sale, and at no time did they consent to any sale other than for cash.

29. Prior to the commencement of the above entitled matter and after said sale, plaintiffs offered to pay said defendant the sum of $433,000.00 together with an additional $25,000.00 for the property. Defendants refused to accept said offer and refused to convey said

property.

FIRST CAUSE OF ACTION

(QUIET TITLE)

As and for the first cause of action, as a cause of action in quiet title, against all defendants, plaintiffs allege that:

30. Paragraphs 1 through 24 hereinabove are hereby incorporated herein by reference.

31. Plaintiffs have the right to the immediate and exclusive possession of said real property subject to said deed of trust, a copy of which is attached as Exhibit A hereto, and subject to the rights of SHELDON L. FOREMAN and ANN FANT FOREMAN and SHELDON L. FOREMAN and ANN FANT FOREMAN own said deed of trust and the note secured thereby.

32. Defendants, and each of them, claim some right, title and/or interest in and to said real property, said trust

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($232,000.00), together with interest thereon from August 25, 1987 at 12% per year. Other plaintiffs have been damaged in the sum of One Hundred Thousand Dollars ($100,000.00).

40. By reason of the foregoing, plaintiffs hold equitable title to said real property and to said second trust deed and defendants, and each of them, hold bare legal title subject to the equitable rights of plaintiffs so aforesaid. That SHELDON L. FOREMAN and ANN FANT FOREMAN have vendor's lien in said real property.

41. By reason of the foregoing, defendants hold such property subject to a trust in favor of plaintiffs.

WHEREFORE, plaintiffs pray judgment:

(1) Quieting title to the real property described in the Complaint and determining that the defendants have no right, title or interest therein and

barring them forever from making any claim to any right, title or interest therein, for decree determining that the documents which were recorded, which are described in the Complaint and were recorded, except for the deed from the PEDERSENS to HENIG, were and are valid documents and were not forged.

(2) Declaring that the deed from the PEDERSENS to HENIG conveyed no right, title or interest in and to said real property and determining and declaring the rights of the parties hereto under the documents and agreements referred to and/or alleged in this Complaint.

(3) Determining that defendants hold title only as trustee for BFP or RUSSELL BARTON subject to the trust deed for the benefit of SHELDON L. FOREMAN and ANN FANT FOREMAN, and must convey to them.

(4) That SHELDON L. FOREMAN and ANN

FANT FOREMAN have and recover Two Hundred Thirty-Two Thousand Dollars ($232,000.00) as damages, together with interest thereon at 10% from August 25, 1987, from defendants, and each of them, and if plaintiffs do not have such judgment or the real property.

(5) That the other plaintiffs recover the sum of $100,000.00 from defendants, and each of them;

(6) For costs of suit incurred herein;

(7) For attorneys fees; and

(8) For such other relief as the Court may deem just.

Dated: August 13, 1989.

WOOLSEY, ANGELO & THATCHER

BY /s/ Roy B. Woolsey

ROY B. WOOLSEY

Attorney for Plaintiffs

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husband and wife as joint tenants, herein called BENEFICIARY.

WITNESSETH: THAT TRUSTOR IRREVOCABLY GRANTS, TRANSFERS AND ASSIGNS TO TRUSTEE IN TRUST, WITH POWER OF SALE, that property in City of Newport Beach, Orange County, California described as:

Lots 946 and 947 of Tract No. 907, in the City of Newport Beach, County of Orange, State of California, as shown on a map recorded in Book 28, pages 25 to 36 inclusive, of Miscellaneous Maps, in the office of the County Recorder of said County together with the Northwesterly 17 feet of that portion of Via Genoa adjoining said land on the Southeast abandoned by resolution of the City Council of the City of Newport Beach, a certified copy of which resolution was recorded June 10, 1953 in Book 2518, Page 348, Official Records.

THIS DEED IS JUNIOR AND SECOND TO AN

EXISTING FIRST TRUST DEED OF RECORD.

* * *

For the purpose of securing: 1. Performance of each agreement of trustor incorporated by reference or contained herein. 2.

Payment of the indebtedness evidenced by one promissory note of even date herewith, and any extension of renewal thereof in the principal sum of $200,000.00 executed by Trustor in favor of Beneficiary or order.

* * *

Signature of Trustor

B.F.P., a General Partnership

By: /s/ Russell J. Barton

[ACKNOWLEDGMENT NOT REPRODUCED]

EXHIBIT "B" TO EXHIBIT 2 TO EXHIBIT "B"

TO MOTION TO DISMISS)

87-554265
RECORDED IN OFFICIAL RECORDS

OF ORANGE COUNTY, CALIFORNIA

OCTOBER 1987

Lee A. Branch, County Recorder

RECORDING REQUESTED BY WAYNE L. PEDERSEN, MARLENE M. PEDERSEN

WHEN RECORDED MAIL TO OFF-ROAD VEHICLES - RECREATION & FAMILY CAMPGROUND, INC., a California corporation, P. O. BOX 4217

LA MESA, CALIFORNIA 92044

INDIVIDUAL GRANT DEED

The undersigned grantor(s) declare(s)

Documentary transfer tax is $330.00

( ) computed on full value of property conveyed, or

(x) computed on full value less value of liens and encumbrances remaining at time of sale.

( ) unincorporated area

(x) City of NEWPORT BEACH

FOR A VALUABLE CONSIDERATION, receipt of

which is hereby acknowledged,
WAYNE L. PEDERSEN AND MARLENE M. PEDERSEN, Husband and Wife, as Joint Tenants
hereby GRANT(S) TO OFF-ROAD VEHICLES -- RECREATION & FAMILY CAMPGROUND, INC., A CALIFORNIA CORPORATION,
the following described real property in the County of ORANGE, State of California:
Lots 946 and 947 of Tract No. 907, in the City of Newport Beach, County of Orange, State of California, as shown on a map recorded in Book 28, pages 25 to 36 inclusive, of Miscellaneous Maps, in the office of the County Recorder of said County together with the Northwesterly 17 feet of that portion of Via Genoa adjoining said land on the Southeast abandoned by resolution of the City Council of the City of Newport Beach, a certified copy of which resolution was recorded June 10, 1953 in Book 2518, Page 348, Official

Records.
THE STREET ADDRESS OF THE PROPERTY DESCRIBED ABOVE IS COMMONLY KNOWN AS 225 VIA GENOA AVENUE -- LIDO ISLE -- NEWPORT BEACH, CALIF. 92663
DATED: SEPTEMBER 29, 1987

/s/Wayne L. Pedersen
WAYNE L. PEDERSEN
/s/Marlene M. Pedersen
MARLENE M. PEDERSEN

[Acknowledgment omitted in reproduction]

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executed by WAYNE L. PEDERSEN AND MARLENE PEDERSEN, husband and wife as Joint Tenants as Trustor, WILL SELL AT PUBLIC AUCTION TO HIGHEST BIDDER FOR CASH (payable at the time of sale in lawful money of the United States) at
THE NORTH FRONT ENTRANCE TO THE COUNTY COURTHOUSE, 700 CIVIC CENTER DRIVE WEST, SANTA ANA, CA
all right, title and interest conveyed to and now held by it under said Deed of Trust in the property situated in said County and State described as:
LEGAL DESCRIPTION ATTACHED HERETO AND MADE A PART HEREOF
The street address and other common designation, if any, of the real property described above is purported to be:
225 VIA GENOA, NEWPORT BEACH, CALIFORNIA 92663

The undersigned Trustee disclaims any liability for any incorrectness of

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of Default and Demand for Sale, and a written Notice of Default and Election to Sell. The undersigned caused said Notice of Default and Election to Sell to be recorded in the county where the property is located.

DATE: 28 NOV 88

MORTGAGE FORECLOSURE SERVICES, INC., TRUSTEE, BY SPECIALIZED, INC., AS AGENT FOR SAID TRUSTEE
3040 STATE STREET
SANTA BARBARA, CA 93105
(805)687-8108
BY: /s/ Julie A. Lindman
JULIE A. LINDMAN,
TRUSTEE SALES OFFICER

Legal Description

Lots 946 and 947 of Tract No. 907, in the City of Newport Beach, County of Orange, State of California, as shown on a map recorded in Book 28, pages 25 to 36

inclusive, of Miscellaneous Maps, in the office of the County Recorder of said County together with the Northwesterly 17 feet of that portion of Via Genoa adjoining said land on the Southeast abandoned by resolution of the City Council of the City of Newport Beach, a certified copy of which resolution was recorded June 10, 1953 in Book 2518, Page 348, Official Records.

THE STREET ADDRESS OF THE PROPERTY DESCRIBED ABOVE IS COMMONLY KNOWN AS 225 VIA GENOA AVENUE -- LIDO ISLE -- NEWPORT BEACH, CALIF. 92663

EXHIBIT "3" TO DECLARATION OF EZER IN SUPPORT OF MOTION FOR RELIEF ETC.

(PART OF EXHIBIT B TO MOTION TO DISMISS)

* * *

SUPERIOR COURT OF THE STATE OF CALIFORNIA

FOR THE COUNTY OF ORANGE

SHELDON L. FOREMAN, et al.,	CASE NO. 600205
Plaintiffs,	NOTICE OF HEARING OF DEMURRER TO COMPLAINT
vs.	
IMPERIAL SAVINGS & LOAN ASSOCIATION, etc., et al.,	Date: 10-27-89 Time: 9:30 a.m. Dept: 23
Defendants.	

TO PLAINTIFFS AND THEIR ATTORNEYS:

PLEASE TAKE NOTICE that on October 27, 1989, at 9:30 a.m., or as soon thereafter as the matter can be heard, in the Courtroom of Department 23 of the above-entitled Court, located in the County Courthouse, 700 Civic Center Drive West, Santa Ana, California, defendants Paul Osborne, William Little, Dennis Roy,

Arthur Ritz, Jose Cruz, and Richard Marcy will bring on for hearing their appended Demurrer to Complaint.

Dated: September 15, 1989

RICH & EZER

By: /s/ Mitchel J. Ezer

Attorneys for Defendants

* * *

DEMURRER TO COMPLAINT

COMES NOW, defendants Robert Osborne, William Little, Dennis Roy, Arthur Ritz, Jose Cruz and Richard Marcy, and demur to the first, second and third alleged causes of action contained in plaintiffs' Complaint on file herein on grounds that neither the first, second nor third alleged causes of action state facts sufficient to constitute a cause of action against these demurring defendant.

WHEREFORE, these demurring defendants pray that this Demurrer be sustained without leave to amend; for their costs

of suit herein incurred; and for such other and further relief as the Court deems just.

Dated: September 15, 1989

RICH & EZER

By: /s/ Mitchel J. Ezer

Attorneys for Defendants

* * *

MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF DEMURRER TO COMPLAINT

This Memorandum of Points and Authorities is submitted on behalf of defendants Paul Osborne, William Little, Dennis Roy, Arthur Ritz, Jose Cruz, and Richard Marcy (hereinafter collectively called the "Movants") in support of both their Demurrer to Complaint[1] and their Motion to Expunge Lis Pendens.[2]

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1. The statutory basis for which is C.C.P. 430.10(e)

2. The statutory basis for which is C.C.P. 409.1

I.

INTRODUCTION

At the core of this controversy is the real property (the "Property") commonly known as 225 Via Genoa Avenue, Lido Isle, Newport Beach, California. In the Complaint, a series of complex transactions between the plaintiffs involving the Property is alleged, amidst which are interspersed allegations relating to the due execution of a $356,250.00 first deed of trust (the "First Trust Deed") encumbering the Property, which is due course was assigned to defendant Imperial Savings & Loan Association (Complaint, Page 5, Lines 3-18); the recordation by Imperial Savings of a Notice of Default under the First Trust Deed (Id. paragraph 15); that, in due course, Imperial Savings gave notice of the sale, but did so improperly (Id. paragraph 18); and that Imperial Savings verbally promised not to

conduct a sale until after July 17, 1989 (Id. paragraphs 19 and 25) but in violation of that promise conducted a trustee's sale on July 12, 1989. (Id., Page 10, Lines 27-28). Then, in the only averments relating to Movants, it is first alleged that at the July 12, 1989 sale Movants purchased the Property for $433,000.00 (Id. paragraph 27); and, on information and belief, that the cash price was not paid then but at a later date. (Id. paragraph 28). It is not alleged, intimated or even hinted that Movants had any knowledge of what supposedly had transpired between plaintiffs and Imperial Savings. For a variety of reasons, therefore, the Complaint -- which seeks a quieted title, declaratory relief and to impose a constructive trust upon the Property -- does not state a cause of action <u>as against Movants.</u>

II.

ORAL CONTRACT TO CONTINUE SALE

It is settled law that a verbal agreement to continue a trustee's sale is unenforceable:

"A contract in writing may not be altered by an executory oral agreement. (Civil Code, section 1698). An agreement to postpone a valid sale of property beyond the date when said property may be sold under and according to the terms of the trust deed obviously is an agreement to alter the terms of the instrument. To hold otherwise would reduce a trust deed in any case to an unsubstantial if not a worthless security." (Emphasis added).

Karlsen v. American Savings & Loan Assn., 15 C.A.3d 112, 121, 92 Cal.Rptr. 851 (1971).

Accord, Stafford v. Clinard, 87 C.A.2d

480, 481, 197 P.2d 84 (1948).

III.

THE CONCLUSIVE PRESUMPTION

Attached hereto as Exhibit 1 and incorporated herein by reference is a copy of the recorded Trustee's Deed Upon Sale. This instrument is subject to judicial notice under Evidence Code Section 452(h), and the Court is respectfully requested to take judicial notice of it pursuant to that section and under Sections 430.30(a) and 430.70 of the Code of Civil Procedure. In pertinent part, it states:

"Default occurred as set forth in a Notice of Default and Election to Sell which was recorded in the office of the Recorder of said [Orange] County.

All requirements of law regarding the mailing of copies of notices of default and related no-

tices and the posting and publication of copies of the Notice of Sale have been complied with.

Said property was sold by said Trustee at public auction on July 12, 1989 at 10:00 a.m. at the place named in the Notice of Sale, in the county of Orange, in which the property is situated. Grantee, being the highest bidder at such sale, became the purchaser of said property and paid therefore to said Trustee the amount bid, being $433.600.00 in lawful money of the United States, or by the satisfaction, pro tanto, of the obligations then secured by said Deed of Trust." (Emphasis added)

Repeatedly, the courts have held that recitals such as these create a presumption which is indeed conclusive and preclusive of precisely the type of

attack on a trustee's sale such as plaintiffs here have launched. For example, in Pierson v. Fisher, 131 C.A.2d 208, 216, 180 P.2d 91 (1955), the court found that the provisions of the Trustee's Deed were conclusive, and refused to set aside the Trustee's Deed Upon Sale, stating:

> ". . . And concerning all of them, appellant by the instrument he executed, declared that the recitals in a deed made by his trustee that all of the duties of the trust respecting the sale had been complied with should bind him. In short, he thereby made the trustee his agent with such powers that the trustee could bind him, notwithstanding that he had not carried out the provisions of his trust. As the Supreme Court said in Mersfelder v. Spring, 139 Cal. 593, 595 [73 P. 452]: Such stipulations

'in express terms give the trustee the authority to bind his principal by the mere execution of a deed containing the precise recitals.' As against a purchaser who does not participate in or know of the failure of the trustee to perform his duties, the recital that he has been true to his trust binds the trustee's principal and such purchaser may rely upon those provisions in purchasing at the sale.

. . .

The Complaint cannot be amended to state a cause of action based upon any claimed failure of the Trustee properly to conduct the sale. and the court did not err in sustaining the demurrer without leave to amend. (Emphasis added)

Accord, Taliaferro v. Crola, 152 C.A.2d

448, 313 P.2d 136 (1957) ("The recitals of the trustee's deed are conclusive in the absence of fraud of which the purchaser at the trustee's sale had knowledge or notice"); Abrahamer v. Parks, 141 C.A.2d 82, 296 P.2d 341 (1956) ("The trustee's deed recites a default, the execution and delivery by the trustee of a written declaration of default and demand for sale, compliance with section 2924 and 2924b of the Civil Code, the giving of notice of sale by publication and by posting in three public places in Los Angeles and in a conspicuous place on each parcel of the property after not less than three months from the date of recording the notice of default, and the sale at public auction to plaintiff, the highest bidder. Defendants were precluded in this proceeding by these recitals"); Cobb v. California Bank, 6 C.2d 389, 57

P.2d 924 (1936) ("The deed of trust under which the property was sold contains the usual recital that the recitals in the trustee's deed of any matters of fact affecting the regularity or validity of the foreclosure sale shall be conclusive proof of the truthfulness thereof and that said trustee's deed shall be conclusive against all persons as to all matters of fact therein recited. . . . The appellants herein were concluded by these recitals in the trustee's deed"); Central National Bank v. Bell, 5 C.2d 324, 54 P.2d 1107 (1936) ("The trust deeds provided that, in the event o sale thereunder, the recitals in the trustee's deeds . . . should be conclusive evidence of all such facts recited. In this action and on the record before us the defendants were concluded by the recitals in the trustee's deeds");

Carpenter v. Smallpage, 200 Cal. 129, 29 P.2d 841 (1934) ("The court set forth the various steps taken to foreclose the trust deed, all of which were proven by the recitals in the trustee's deed. These recitals under the terms of the trust deed were made conclusive proof of all facts therein recited. . ."); Jose Realty Co. v. Pavlicevich, 163 Cal. 613, 130 Pac. 15 (1911) ("If the recital in the trustee's deed is conclusive on Cottle and his successors in interest, it would follow that this finding is contrary to the evidence. That such recital is conclusive, where the deed of trust empowers the trustee to make it, in the absence of fraud of which the purchaser at the trustee's sale had notice, appears to be settled by the decisions of this Court"); Birkhofer v. Krumm, 27 C.A.2d 513, 81 P.2d 609 (1938) ("The

trustee's deed for the property sold is in evidence and recites in detail not only that the notice was given but the manner in which it was given and that by the terms of the deed of trust such recitals are made conclusive of the facts recited"): Bechtel v. Wilson, 18 C.A.2d 331, 63 P.2d 1170 (1936) ("The recitals in the trustee's deed of due and proper posting is made conclusive evidence thereof by the deed of trust and this alone is sufficient to sustain the trial court's findings on that issue"); Johnson v. Grant, 87 Cal.App. 402, 262 Pac. 402 (1927) ("The recitals in the deed that the trustee exposed the property for sale at public auction to the highest bidder are sufficient to support the finding that the sale was fairly and legally conducted".

More recently, in Napue v. Gor-Mey West Inc., 175 C.A.3d 608, 220 Cal.Rptr.

799 (1985), the Court of Appeal considered a Los Angeles Superior Court decision to set aside a foreclosure sale. In reversing the trial court, the Court of Appeal specifically stated that:

> "In order to protect a purchaser of a property in a trustee's sale, section 294 provides that a recital in the deed executed pursuant to a power of sale that all procedural requirements have been complied with 'shall constitute prima facie evidence of compliance of such requirements and conclusive evidence thereof in favor of bona fide purchasers and encumbrancers for value and without notice.' Thus, any failure to comply with the procedural requirements of section 2924 will not affect the validity of the sale in favor of a bona fide purchaser. A sale to a bona fide

purchaser is not voidable." (Emphasis added.)

And in Wolfe v. Lipsy, 163 C.A.3d 633, 209 Cal.Rptr. 801 (1985), the Court of Appeal reversed a Los Angeles Superior Court which had set aside a foreclosure sale. Relying on section 2924, the Court of Appeal explained:

"Thus, Civil Code section 2924 contains two presumptions. One is rebuttable presumption here the recital in the trustee's deed upon sale is merely prima facie evidence of statutory compliance. (Evid. Code, Section 602.) The other is a conclusive presumption where the trustee's sale involves a bona fide purchaser or encumbrancer for value and without notice. 'A conclusive presumption is one that requires the trier of fact to find that the presumed fact exists from a finding

of the existence of the basic fact. The presumption is conclusive because the adverse party against whom it operates is not permitted to introduce evidence to contradict or rebut the existence of the presumed fact.' (Citations omitted.)" (Emphasis added.)

There is, in short, a clear distinction between the binding effect of recitals on the parties, and, as here, their effect when the property has been sold to an uninvolved third-party purchaser:'

"It is claimed by appellant, however, that because such deed of trust contains the provisions that, in the event of a sale of said premises, or any part thereof, and the execution of a deed thereto under the trust, that the recitals therein of any default, payments, publication of notice of sale, demand

that such sale should be made, postponement of sale, terms of sale, purchaser, payment of purchase money, fact or facts confirming the regularly or validity of such sale, shall be conclusive proofs of such matters and of all other facts recited therein against the said first parties, defendants are estopped to claim irregularity connected with the sale. That this would be the effect as to a purchase by a third party and a conveyance to him by the trustee must be conceded." (Emphasis added)

The law was well summarized in Harker v. Rickershauser, 94 Cal.App. 755, 271 Pac. 912 (1928):

> "The theory upon which the courts have proceeded in construing recitals in trustee's deeds is that the grantor under the trust deed is

bound by the delegation of such authority as is given to the trustee in the exercise of his trust. This includes the execution of a deed pursuant to a sale, and the inclusion in said deed of such recitals as the parties may agree upon, and may include a clause relative to the conclusiveness of such recitals as to truth of the facts stated therein. Such recitals are conclusive where an innocent third party is the grantee in the trustee's deed, (Jose Realty Co. v. Pavlicevich, 164 Cal. 613, 130 P. 15), but they are not conclusive as between the parties of the trust deed. Secccombe v. Roe, 22 Cal. App. 139, 133 P. 507)." (Emphasis added)

Manifestly, then, plaintiffs are precluded by the recitals in the Trus-

tee's Deed from now alleging that Movants did not acquire good title to the Property at the foreclosure sale.

IV.

BONA FIDE PURCHASE

Not only does the Trustee's Deed (Exhibit 1) contain the recitals upon which the conclusive presumption is based, it also by itself, in the absence of any factual allegations by plaintiffs to the contrary (and they are totally and completely absent), establishes that Movants as a matter of law are bona fide purchasers of the property.

To qualify as a bona fide purchaser, one does not have to be a candidate for sainthood or possess the moral rectitude of a Chasidic Rabbi. In law, a "bona fide purchaser is one who has purchased property for value without notice of any defects in the title of the seller." Walters v. Calderon, 25 C.A.3d 863, 876,

102 Cal.Rptr. 89 (1972). Value in this context means legal consideration, not full market value. "In dealing with the question of testing the status of a person as a bona fide purchaser, the question is one of legal consideration necessary to sustain an action for damages rather than the amount of consideration required in an equitable action for specific performance. . . . Ordinarily a court will not weigh the sufficiency of the consideration once it is found to be of some value. Generally some value means any value whatever, even that of a peppercorn, tomtit or one dollar in hand." Walters v. Calderon, supra. Since Movants paid $433,600.00 cash for the Property, there can no be question but that "value" was paid.

The foreclosure sale buyer without notice is protected as a bona fide purchaser. See Karrell v. First Thrift of

Los Angeles, 104 C.A.2d 536, 232 P.2d 1 (1951):

"Was Kessler a bona fide purchaser for value without notice?

Yes. There is no evidence in the record to indicate that defendant Kessler had any knowledge of the agreement or transactions between plaintiff and First Thrift or plaintiff and Great Western. Therefore, he was a bona fide purchaser for value without notice and as such was not chargeable with the fraud of his predecessor and took a title purged of any anterior fraud affecting it and free of any equities existing between the original parties."

Accord, Lancaster Security Investment Corp. v. Kessler, 159 C.A.2d 649, 324 P.2d 634 (1958); Strutt v. Ontario Savings & Loan Assn., 11 C.A.3d 547, 90

Cal.Rptr. 69 (1979). See also 1 Miller & Starr, Current Law of California Real Estate, Part I, pp. 543-44 (Rev. ed. 1975):

"A third person who buys at the foreclosure sale is a bona fide purchaser for value, and he takes the title free and clear of any unknown defects or defenses to his title."

V.

DECLARATORY RELIEF

Plaintiffs have included a declaratory relief count (the second cause of action) in their Complaint in the apparent belief that it will somehow avoid the effect of a demurrer. Not so. Declaratory relief is as vulnerable to demurrer as any other cause of action when, as here, it appears that the underlying claims have already crystallized, and do not require adjudication of rights to arise

in the future. In Travers v. Louden, 254 C.A.2d 926, 62 Cal.Rptr. 654 (1967), the rule was stated as follows:

> "There is unanimity of authority to the effect that the declaratory procedure operates prospectively, and not merely for the redress of past wrongs. It serves to set controversies at rest before they lead to repudiation of obligations, invasion of rights or commission of wrongs; in short, the remedy is to be used in the interests of preventive justice, to declare rights rather than execute them.
>
> * * *
>
> The courts should not temporize with the improper use of the declaratory procedure . . . Undeserving cases should be disposed of in a summary manner, as upon demurrer."

In Silver v. City of Los Angeles, 217 C.A.2d 134, 31 Cal.Rptr. 545 (1963), a demurrer to a declaratory relief suit was sustained without leave to amend and affirmed on appeal, the Court noting:

> "Where plaintiff makes no case on the merits and a declaratory relief action would merely produce a useless trial, a dismissal is proper."

Similarly, in Igna v. City of Baldwin Park, 9 C.A.3d 909, 915, 88 Cal.Rptr. 581 (1970), where a demurrer to a declaratory relief complaint was sustained without leave to amend, it was held:

> "When it is clearly indicated that plaintiff would be unable to amend to state a cause of action, it is proper for the court to sustain the demurrer without leave to amend. Leave to amend is appropriately withheld where it is clear

that plaintiff is seeking the legally impossible."

Accord, Konecko v. Konecko, 164 C.A.2d 249, 330 P.2d 393 (1958); California State Employees Assn. v. Fluornoy, 32 C.A.3d 219, 240-41, 108 Cal.Rptr. 251 (1973), Jackson v. Teachers Ins. Co., 30 C.A.3d 341, 343-44, 106 Cal.Rptr. 208 (1973); Stribling v. Maillard, 6 C.A.3d 470, 475, 85 Cal.Rptr. 92 (1970); Wilson v. Civil Service Commission, 224 C.A.2d 340, 344, 36 Cal.Rptr. 559 (1968); Jefferson v. City of Los Angeles, 266 C.A.2d 300, 303, 72 Cal.Rptr. 85 (1968).

CONCLUSION

The Complaint manifestly does not state a cause of action against Movants. Whether leave to amend is granted or not should, it is submitted, depend upon whether plaintiffs' counsel can represent to the Court that he can truthfully allege additional facts (which he cannot,

since none exist) that will overcome the points raised by the Demurrer. Whether leave to amend is granted or not, however, the motion to expunge the lis pendens should either be granted at this time -- since the lis pendens was recorded by plaintiffs deliberately to befoul a pending sale of the Property by Movants to a third-party -- or, pursuant to C.C.P. 409.1(b), plaintiffs should be required to post a $725,000 bond ($725,000 being the property value alleged by plaintiffs; Complaint, Page 10, Lines 18-19) as a condition of denying expungement.

Dated: September , 1989

Respectfully submitted,

RICH & EZER

Attorneys for Defendants PAUL OSBORNE, WILLIAM LITTLE DENNIS ROY, ARTHUR RITZ, JOSE CRUZ, and RICHARD MARCY

EXHIBIT "4" TO DECLARATION OF EZER

IN SUPPORT OF MOTION FOR RELIEF, ETC.

* * *

SUPERIOR COURT OF THE STATE OF CALIFORNIA

FOR THE COUNTY OF ORANGE

SHELDON L. FOREMAN, et al.,	CASE NO. 600205
Plaintiffs,	NOTICE OF MOTION FOR ORDER EXPUNGING LIS PENDENS
vs.	
IMPERIAL SAVINGS & LOAN ASSOCIATION, etc., et al.,	Date: 10-27-89 Time: 9:30 a.m. Dept: 23
Defendants.	

TO PLAINTIFFS AND THEIR ATTORNEYS:

PLEASE TAKE NOTICE that on October 27, 1989, at 9:30 a.m., or as soon thereafter as the matter can be heard, in the Courtroom of Department 23 of the above-entitled Court, located in the County Courthouse, 700 Civic Center Drive West, Santa Ana, California, defendants Paul Osborne, William Little, Dennis Roy, Arthur Ritz, Jose Cruz, and Richard Marcy

will move this Court for its order expunging that certain 'Notice of Lis Pendens" recorded in the Orange County Records on or about August 18, 1989 in connection with the above entitled action.

Said motion will be made on the grounds that at the time of recordation of said Lis Pendens the plaintiffs had no title or claim of title as against Movants to the real property which is the subject of this action.

Said motion will be based on this Notice of Motion, on the Declaration of William Little, on the separate Memorandum of Points and Authorities supporting both this motion and the Demurrer to Complaint being filed concurrently herewith, and upon all of the pleadings, records and files in this action.

Dated: September 15, 1989

RICH & EZER * * *

* * *

MEMORANDUM OF POINTS AND AUTHORITIES

IN SUPPORT OF MOTION FOR ORDER

EXPUNGING LIS PENDENS

This Memorandum of Points and Authorities is submitted on behalf of defendants Paul Osborne, William Little, Dennis Roy, Arthur Ritz, Jose Cruz, and Richard Marcy (hereinafter collectively called the "Movants") in support of both their Demurrer to Complaint[1] and their Motion to Expunge Lis Pendens.[2]

I.

INTRODUCTION

At the core of this controversy is the real property (the "Property") commonly known as 225 Via Genoa Avenue, Lido Isle, Newport Beach, California. In the Complaint, a series of complex transac-

---

1. The statutory basis for which is C.C.P. 430.10(e)

2. The statutory basis for which is C.C.P. 409.1

tions between the plaintiffs involving the Property is alleged, amidst which are interspersed allegations relating to the due execution of a $356,250.00 first deed of trust (the "First Trust Deed") encumbering the Property, which is due course was assigned to defendant Imperial Savings & Loan Association (Complaint, Page 5, Lines 3-18); the recordation by Imperial Savings of a Notice of Default under the First Trust Deed (Id. Paragraph 15); that, in due course, Imperial Savings gave notice of the sale, but did so improperly (Id. Paragraph 18); and that Imperial Savings verbally promised not to conduct a sale until after July 17, 1989 (Id. Paragraphs 19 and 25) but in violation of that promise conducted a trustee's sale on July 12, 1989. (Id., Page 10, Lines 27-28). Then, in the only averments relating to Movants, it is first alleged that at the July 12, 1989

sale Movants purchased the Property for $433,000,00 (Id. Paragraph 27); and, on information and belief, that the cash price was not paid then but at a later date. (Id. Paragaph 28). It is not alleged, intimated or even hinted that Movants had any knowledge of what supposedly had transpired between plaintiffs and Imperial Savings. For a variety of reasons, therefore, the Complaint -- which seeks a quieted title, declaratory relief and to impose a constructive trust upon the Property -- does not state a cause of action as against Movants.

II.

ORAL CONTRACT TO CONTINUE SALE

It is settled law that a verbal agreement to continue a trustee's sale is unenforceable:

"A contract in writing may not be altered by an executory oral agreement. (Civil Code, section

1698). An agreement to postpone a valid sale of property beyond the date when said property may be sold under and according to the terms of the trust deed obviously is an agreement to alter the terms of the instrument. To hold otherwise would reduce a trust deed in any case to an unsubstantial if not a worthless security." (Emphasis added).

Karlsen v. American Savings & Loan 15 C.A.3d 112, 121, 92 Cal. Rptr. 851 (1971)

Accord, Stafford v. Clinard, 87 C.A.2d 480, 481, 197 P.2d 84 (1948).

III.

THE CONCLUSIVE PRESUMPTION

Attached hereto as Exhibit 1 and incorporated herein by reference is a copy of the recorded Trustee's Deed Upon Sale. This instrument is subject to judicial notice under Evidence Code

Section 452(h), and the Court is respectfully requested to take judicial notice of it pursuant to that section and under Sections 430.30(a) and 430.70 of the Code of Civil Procedure. In pertinent part, it states:

"Default occurred as set forth in a Notice of Default and Election to Sell which was recorded in the office of the Recorder of said [Orange] County.

All requirements of law regarding the mailing of copies of notices of default and related notices and the posting and publication of copies of the Notice of Sale have been complied with.

Said property was sold by said Trustee at public auction on July 12, 1989 at 10:00 a.m. at the place named in the Notice of Sale, in the County of Orange, in which the

property is situated. Grantee, being the highest bidder at such sale, became the purchaser of said property and paid therefore to said Trustee the amount bid. being $433,600.00 in lawful money of the United States, or by the satisfaction, pro tanto, of the obligations then secured by said Deed of Trust." (Emphasis added)

Repeatedly, the courts have held that recitals such as these create a presumption which is indeed conclusive and preclusive of precisely the type of attack on a trustee's sale such as plaintiffs here have launched. For example, in Pierson v. Fisher, 131 C.A.2d 208, 216, 180 P.2d 91 (1955), the court found that the provisions of the Trustee's Deed were conclusive, and refused to set aside the Trustee's Deed Upon Sale, stating:

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them, appellant by the instrument he executed, declared that the recitals in a deed made by his trustee that all of the duties of the trust respecting the sale had been complied with should bind him. In short, he thereby made the trustee his agent with such powers that the trustee could bind him, notwithstanding that he had not carried out the provisions of his trust. As the Supreme Court said in Mersfelder v. Spring, 139 Cal. 593, 595 t73 P. 452]: Such stipulations 'in express terms give the trustee the authority to bind his principal by the mere execution of a deed containing the precise recitals.' As against a purchaser who does not participate in or know of the failure of the trustee to perform his duties, the recital that he has

been true to his trust binds the trustee's principal and such purchaser may rely upon those provisions in purchasing at the sale.

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The Complaint cannot be amended to state cause of action based upon any claimed failure of the trustee properly to conduct the sale, and the court did not err in sustaining the demurrer without leave to amend. (Emphasis added)

Accord, Taliaferro v. Crola 152 C.A.2d 448, 313 P.2d 136 (1957) ("The recitals of the trustee's deed are conclusive in the absence of fraud of which the purchaser at the trustee's sale had knowledge or notice); Abrahamer v. Parks, 141 C.A.2d 82, 296 P.2d 341 (1956) ("The trustee's deed recites a default, the execution and delivery by the trustee of a written declaration of default and

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> "In order to protect a purchaser of a property in a trustee's sale, section 294 provides that a recital in the deed executed pursuant to a power of sale that all procedural requirements have been complied with 'shall constitute prima facie evidence of compliance of such

requirements and conclusive evidence thereof in favor of bona fide purchasers and encumbrancers for value and without notice.' Thus, any failure to comply with the procedural requirements of section 2924 will not affect the validity of the sale in favor of a bona fide purchaser. A sale to a bona fide purchaser is not voidable." (Emphasis added.)

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purchasers of the property.

To qualify as a bona fide purchaser, one does not have to be a candidate for sainthood or possess the moral rectitude of a Chasidic Rabbi. In law, a "bona fide purchaser is one who has purchased property for value without notice of any defects in the title of the seller." Walters v. Calderon, 25 C.A.3d 863, 876, 102 Cal.Rptr. 89 (1972). Value in this context means legal consideration, not full market value. "In dealing with the question of testing the status of a person as a bona fide purchaser, the question is one of legal consideration necessary to sustain an action for damages rather than the amount of consideration required in an equitable action for specific performance. . . . Ordinarily a court will not weigh the sufficiency of the consideration once it is found to be of some value. Generally some value means

any value whatever, even that of a peppercorn, tomtit or one dollar in hand." Walters v. Calderon, supra. Since Movants paid $433,600.00 cash for the Property, there can no be question but that "value" was paid.

The foreclosure sale buyer without notice is protected as a bona fide purchaser. See Karrell v. First Thrift of Los Angeles, 104 C.A.2d 536, 232 P.2d 1 (1951):

"Was Kessler a bona fide purchaser for value without notice?

Yes. There is no evidence in the record to indicate that defendant Kessler had any knowledge of the agreement or transactions between plaintiff and First Thrift or plaintiff and Great Western. Therefore, he was a bona fide purchaser for value without notice and as such was not charge-

able with the fraud of his predecessor and took a title purged of any anterior fraud affecting it and free of any equities existing between the original parties."

Accord, Lancaster Security Investment Corp. v. Kessler, 159 C.A.2d 649, 324 P.2d 634 (1958); Strutt v. Ontario Savings & Loan Assn., 11 C.A.3d 547, 90 Cal.Rptr. 69 (1979). See also 1 Miller & Starr, Current Law of California Real Estate, Part I, pp. 543-44 (Rev. ed. 1975):

"A third person who buys at the foreclosure sale is a bona fide purchaser for value, and he takes the title free and clear of any unknown defects or defenses to his title."

V.

DECLARATORY RELIEF

Plaintiffs have included a declara-

tory relief count (the second cause of action) in their Complaint in the apparent belief that it will somehow avoid the effect of a demurrer. Not so. Declaratory relief is as vulnerable to demurrer as any other cause of action when, as here, it appears that the underlying claims have already crystallized, and do not require adjudication of rights to arise in the future. In Travers v. Louden, 254 C.A.2d 926, 62 Cal.Rptr. 654 (1967), the rule was stated as follows:

> "There is unanimity of authority to the effect that the declaratory procedure operates prospectively, and not merely for the redress of past wrongs. It serves to set controversies at rest before they lead to repudiation of obligations, invasion of rights or commission of wrongs; in short, the remedy is to be used in the interests of preven-

> tive justice, to declare rights rather than execute them.
>
> * * *
>
> The courts should not temporize with the improper use of the declaratory procedure . . . Undeserving cases should be disposed of in a summary manner, as upon demurrer."

In Silver v. City of Los Angeles, 217 C.A.2d 134, 31 Cal.Rptr. 545 (1963), a demurrer to a declaratory relief suit was sustained without leave to amend and affirmed on appeal, the Court noting:

> "Where plaintiff makes no case on the merits and a declaratory relief action would merely produce a useless trial, a dismissal is proper."

Similarly, in Igna v. City of Baldwin Park, 9 C.A.3d 909, 915, 88 Cal.Rptr. 581 (1970), where a demurrer to a declaratory

relief complaint was sustained without leave to amend, it was held:

> "When it is clearly indicated that plaintiff would be unable to amend to state a cause of action, it is proper for the court to sustain the demurrer without leave to amend. Leave to amend is appropriately withheld where it is clear that plaintiff is seeking the legally impossible."

Accord, Konecko v. Konecko, 164 C.A.2d 249, 330 P.2d 393 (1958); California State Employees Assn. v. Fluornoy, 32 C.A.3d 219, 240-41, 108 Cal.Rptr. 251 (1973), Jackson v. Teachers Ins. Co., 30 C.A.3d 341, 343-44, 106 Cal.Rptr. 208 (1973); Stribling v. Maillard, 6 C.A.3d 470, 475, 85 Cal.Rptr. 92 (1970); Wilson v. Civil Service Commission, 224 C.A.2d 340, 344, 36 Cal.Rptr. 559 (1968); Jefferson v. City of Los Angeles, 266 C.A.2d 300, 303, 72 Cal.Rptr. 85 (1968).

CONCLUSION

The Complaint manifestly does not state a cause of action against Movants. Whether leave to amend is granted or not should, it is submitted, depend upon whether plaintiffs' counsel can represent to the Court that he can truthfully allege additional facts (which he cannot, since none exist) that will overcome the points raised by the Demurrer. Whether leave to amend is granted or not, however, the motion to expunge the lis pendens should either be granted at this time -- since the lis pendens was recorded by plaintiffs deliberately to befoul a pending sale of the Property by Movants to a third-party -- or, pursuant to C.C.P. 409.1(b), plaintiffs should be required to post a $725,000 bond

($725,000 being the property value alleged by plaintiffs; Complaint, Page 10, Lines 18-19) as a condition of denying expungement.

Dated: September , 1989

Respectfully submitted,

RICH & EZER

By: /s/MITCHEL J. EZER

Attorneys for Defendants

EXHIBIT "5" TO DECLARATION OF EZER IN SUPPORT OF MOTION FOR RELIEF ETC.

FILED

JUN 15, 1989

* * *

UNITED STATES BANKRUPTCY COURT

CENTRAL DISTRICT OF CALIFORNIA

In re	Bk. No. SA 88-07521 JR
BFP PARTNERSHIP,	Ref. No. M9-0171 JR
Debtor.	Chapter 11
IMPERIAL SAVINGS ASSOCIATION, its assignees and/or successors in interest,	JUDGMENT AND ORDER VACATING AUTOMATIC STAY
Movant,	Hearing -
vs.	Date: June 12, 1989
	Time: 9:30 a.m.
BFP PARTNERSHIP,	Place: United States Bankruptcy Court
	34 Civic Center
	Santa Ana, CA
	Courtroom 520
Respondent.	

ls2

IT IS HEREBY ORDERED, ADJUDGED AND DECREED that the Automatic Stay in the above-entitled bankruptcy proceeding be immediately vacated and extinguished as to Movant, its assignees and/or successors in interest, and Movant, its assignees and/or successors in interest may proceed with foreclosure of and hold a Trustee's Sale of the subject Property generally known as 225 Via Genoa, Newport Beach, California and legally described as follows:

Lots 946 and 947 of Tract No. 907, in the City of Newport Beach, County of Orange, State of California, as shown on a map recorded in Book 28, pages 25 to 36 inclusive, of Miscellaneous Maps, in the office of the County Recorder of said County together with the Northwesterly 17 feet of that portion of Via Genoa adjoining said land on the Southeast abandoned by resolution of the City Council of the

City of Newport Beach, a certified copy of which resolution was recorded June 10, 1953 in Book 2518, Page 348, Official Records,

according to California Civil Code 2924 et seq., and thereafter commence any action necessary to obtain complete possession of the subject Property.

Dated: June 14, 1989

/s/ JOHN RYAN

UNITED STATES BANKRUPTCY JUDGE

EXHIBIT "6" TO DECLARATION OF EZER IN SUPPORT OF MOTION FOR RELIEF ETC.

WHEN RECORDED MAIL TO: PAUL OSBORNE, 16 GREENWOOD, IRVINE, CA 92714

MAIL TAX STATEMENTS TO: SAME AS ABOVE

FHA/VA/PMI

LOAN NO. 8032005706

T.S. NO. 88-08617

TRUSTEE'S DEED UPON SALE

The undersigned grantor declares:

(1) The grantee herein was not the foreclosing beneficiary.

(2) The amount of the unpaid debt together with costs was $421,815.72.

(3) The amount paid by the grantee at the trustee sale was $433,600.00.

(4) The documentary transfer tax is $477.40.

(5) Said property is in the City of NEWPORT BEACH, and

MORTGAGE FORECLOSURE SERVICES, INC., (herein called Trustee), as the duly appointed Trustee under the Deed of Trust hereinafter described does hereby grant

and convey, but without warranty, express or implied, to

WILLIAM LITTLE, A SINGLE MAN, AS TO AN UNDIVIDED 2/5 INTEREST, DENNIS ROY, AS TO AN UNDIVIDED 1/10 INTEREST, ARTHUR RITZ, AS TO AN UNDIVIDED 1/10 INTEREST, PAUL OSBORNE, AS TO AN UNDIVIDED 1/10 INTEREST, JOSE J. CRUZ, AS TO AN UNDIVIDED 1/10 INTEREST, RICHARD MARCZ, AS TO AN UNDIVIDED 1/5 INTEREST, AS TENANTS IN COMMON

(herein called Grantee), all of its right, title and interest in and to that certain property situated in the City of NEWPORT BEACH, County of ORANGE, State of CALIFORNIA, as described as follows:

LEGAL DESCRIPTION ATTACHED HERETO AND MADE A PART HEREOF

TRUSTEE STATES THAT:

This conveyance is made pursuant to the powers conferred upon Trustee by that certain Deed of Trust dated 8-04-87, and

executed by WAYNE L. PEDERSEN AND MARLENE PEDERSEN, husband and wife as Joint Tenants,

as trustor, and recorded 8-25-87 as instrument no. 87-481935 of Official Records of ORANGE County, State of California, and after fulfillment of the conditions specified in said Deed of Trust authorizing this conveyance.

Default occurred as set forth in a Notice of Default and Election to Sell which was recorded in the office of the Recorder of said County.

All requirements of law regarding the mailing of copies of notices of default and related notices and the posting and publication of copies of the Notice of Sale have been complied with.

Said property was sold by said Trustee as public auction on July 12, 1989 at 10:00 A.M. at the place named in the Notice of Sale, in the County of ORANGE, in which

the property is situated. Grantee, being the highest bidder at such sale, became the purchaser of said property and paid therefore to said Trustee the amount bid, being $433,600.00 in lawful money of the United States, or by the satisfaction, pro tanto, of the obligations then secured by said Deed of Trust.

IN WITNESS WHEREOF, said Specialized, Inc., as agent for the Trustee, has this day caused its corporate name and seal to be hereunto affixed by its Vice President and, thereunto duly authorized by resolution of its Board of Directors.

MORTGAGE FORECLOSURE SERVICES, INC.

(Trustee)

By: Specialized, Inc., Agent

By: /s/ Mary McPheelers

Mary McPheelers, VICE PRESIDENT

[Acknowledgment omitted in reproduction]

[Attachment to TRUSTEE'S DEED UPON SALE]

Lots 946 and 947 of Tract No. 907, in the City of Newport Beach, County of Orange, State of California, as shown on a map recorded in Book 28, pages 25 to 36 inclusive, of Miscellaneous Maps, in the office of the County Recorder of said County together with the Northwesterly 17 feet of that portion of Via Genoa adjoining said land on the Southeast abandoned by resolution of the City Council of the City of Newport Beach, a certified copy of which resolution was recorded June 10, 1953 in Book 2518, Page 348, Official Records.

EXHIBIT "7" (WITHOUT EXHIBITS) TO

DECLARATION OF EZER IN

SUPPORT OF MOTION FOR RELIEF ETC.

* * *

SUPERIOR COURT OF THE STATE OF CALIFORNIA

FOR THE COUNTY OF ORANGE

SHELDON I FOREMAN, et al., Plaintiffs,	No. 600205
vs.	DECLARATION OF DEFENDANT DENNIS ROY IN SUPPORT OF MOTION FOR ORDER EXPUNGING LIS PENDENS
IMPERIAL SAVINGS & LOAN ASSOCIATION, etc., et al., Defendants.	

* * *

I, the undersigned, say:

I am one of the defendants in this action, and make this Declaration in support of the motion of myself and my co-defendants Paul Osborne, William Little, Arthur Ritz, Jose Cruz and Richard Marcy (hereinafter, collectively, "we" or "us")

for expungement of the lis pendens recorded by plaintiffs on or about August 18, 1989.

This is the second lawsuit filed by plaintiffs against us. On or about July 17, 1989, plaintiffs filed Orange County Superior Court Case No. 596890 in which, as in the present case, they attacked the validity of the July 12, 1989 trustee's sale at which we purchased the subject property (225 Via Genoa, Lido Isle, Newport Beach; hereinafter the "Property").[1] Plaintiffs, as they have done here, also recorded a lis pendens in connection with the prior action (copy

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1.A copy of the Complaint in that action, which the Court is respectfully requested to notice judicially pursuant to Evidence Code Sec. 452(d), is attached hereto as Exhibit 1. The Court is also requested to take judicial notice of Exhibits 2 and 3 attached hereto, a description of which follows hereinafter, as both are also subject to judicial notice under Evidence Code Sections 452(d) and (h).

attached as Exhibit 2).

After the Prior Action was filed, I spoke with plaintiffs counsel, Roy B. Woolsey ("Woolsey") on two occasions. During our first conversation, I told Mr. Woolsey that I am an attorney although in this instance I was acting for my co-purchasers and I as a principal; that my co-purchasers and I knew absolutely nothing about the matters alleged in the Prior Action Complaint; that we had attended a noticed public auction of real estate and outbid everyone else present for the Property; that the action as against us was entirely without merit; and that we wanted it withdrawn. Mr. Woolsey said he would look into the matter further, and get back to me. He did so. A few days later, Mr. Woolsey called me and apologized. He said, in substance, that when the Prior Action was filed he and his clients were convinced

that my co-purchasers and I were "in cahoots" with Imperial Savings; that he had since delved deeper into the matter and found that there was absolutely nothing wrong with the trustee's sale; that his client, Sheldon Foreman, who had been "following the sale" with the intention of buying the Property at the sale, had gone on vacation, "lock track" of the sale date, and simply missed the sale; and that he would dismiss the suit, withdraw the lis pendens and have his client surrender possession of the Property to us if we in turn would agree not to sue him and his client, to which I agreed.

Initially, Mr. Woolsey was as good as his word. He dismissed the Prior Action (albeit without prejudice); withdrew the lis pendens (a copy of the withdrawal is attached has Exhibit 3); and, most important, actually caused his

client Mr. Foreman, to surrender possession of the Property to us. Mr. Foreman, in other words, actually vacated the Property voluntarily. It was my impression that Mr. Woolsey and I had settled the case. We are both attorneys, and my experience has been that when counsel agree verbally to a settlement, and the settlement is implemented, that even if it is not documented the matter is settled. Mr. Woolsey, however, apparently has a different view of the matter.

Based upon what I thought was an agreed settlement -- implemented not only by the dismissal of the Prior Action and the withdrawal of the lis pendens, but by the voluntary surrender of possession of the Property by Mr. Foreman to us--my co-purchasers and I entered into an escrow for the resale of the Property. (a copy of the escrow instructions is attached as Exhibit 4). The filing of the present

case -- which is as meritless as the Prior Action -- therefore came not only as a complete shock but has placed my co-purchasers and I in a totally untenable position through no fault of our own. Relying upon Mr. Woolsey's word and the actions of both Mr. Woolsey and his client, Mr. Foreman, we entered into the resale escrow in good faith, but because of the filing of this action and the recordation of the Lis Pendens in connection with it, we cannot now close escrow. The purchaser is threatening suit. We want to perform, but can do so only by having the lis pendens recorded in connection with this action (Ex. 5) expunged. Since this lawsuit, as against my co-purchasers and myself, it utterly meritless -- a fact already conceded by Messrs. Woolsey and Foreman in connection with the Prior Action -- it is urged that the requested expungement be ordered.

I declare under penalty of perjury that the foregoing is true and correct.

Executed on September 21, 1989 at Santa Ana, California.

/s/ Dennis Roy
Dennis Roy

EXHIBIT "C" TO SMENT'S DECLARATION

IN SUPPORT OF MOTION TO DISMISS ETC.

* * *

UNITED STATES BANKRUPTCY COURT

CENTRAL DISTRICT OF CALIFORNIA

In Re:	Bk. No. SA 89-06771-JR
BFP, a Partner, ship,	CHAPTER 11
Plaintiffs,	SUPPLEMENTAL DECLARATION OF DENNIS ROY IN SUPPORT OF MOTION FOR FOR RELIEF
vs.	
IMPERIAL SAVINGS & LOAN ASSOCIATION, etc., et al.,	Hearing -- Date: 10-27-89 Time: 9:30 a.m. Dept: 23
Defendants.	

TO: HONORABLE JOHN RYAN, DEBTOR AND ITS COUNSEL:

PLEASE TAKE NOTICE that Movants hereby submit the Declaration of Dennis Roy in support of, and as a supplement to, their Motion For Relief From Automatic Stay herein.

DECLARATION OF DENNIS ROY

I, DENNIS ROY, declare and state as

follows:

1. As to the following facts, I know them to be true of my own knowledge, and if called upon to testify herein, I could and would testify competently to those facts.

2. I am one of the Movants herein. I am also an attorney duly licensed to practice before this Court and in all courts of the State of California.

3. Sometime prior to July 1989, Respondent/Debtor BFP, a Partnership ("Respondent/Debtor") and others filed a Superior Court action (different than the actions referred to in the Motion for Relief) as to the subject property in the Superior Court for the County of Orange (Case No. X-54-16-04). Neither Movants nor Imperial Savings were parties to that action. Respondent's/Debtor's present counsel, Roy Woolsey, represented Respondent/Debtor and others therein.

4. Within the past three weeks, I have reviewed the Superior Court file with respect to that action.

5. A trial was apparently held in the aforementioned action on or about July 17, 1989. On July 21, 1989, an Announcement of Tentative Decision, apparently prepared by the Superior Court judge who conducted the trial, was filed in that action. A true and correct copy thereof is attached hereto as Exhibit "8" and incorporated herein by reference. I have compared this copy with the original in the court file, and it is identical to the original.

6. The Announcement specifically states that: i) an attempted transfer of title to Respondent/Debtor was invalid (p.2); ii) the vested interest attempted to be transferred "did not pass to BFP" (p. 2); iii) title to the subject Property was quieted in favor of Sheldon L.

Foreman and Ann Fant Foreman (P. 3); and iv) the Foremans received a monetary award of $200,000.00, while Russell J. Barton received an award of $60,000.00 (p. 3).

7. On October 12, 1989, a Statement of Decision was filed in the aforementioned action. It was apparently prepared by Respondent's/Debtor's counsel. A true and correct copy thereof is attached hereto as Exhibit "9" and incorporated herein by reference. I have compared this copy with the original in the Court file, and it is identical to the original.

8. This Statement of Decision specifically states that: a transfer of title to the subject property by Sheldon Foreman and Leroy and Ann Fant Foreman to Wayne and Marlene Pedersen was rescinded (pp. 2-3, section 1); an attempted transfer of title to Respondent/Debtor was unauthorized (p. 5, section 1(a)(vi));

Respondent/Debtor was aware in July 1989 of the default owed to Imperial Savings, its foreclosure proceedings and trustee's sale (p. 6, section 1(a)(xii)); "BFP,- a Partnership" consists of Russell J. Barton, Sheldon and Ann Fant Foreman, and Wayne and Marlene Pedersen (p. 4, section 1 (a)(iv)); the Foremans were awarded $200,000.00 against the Pedersens and Randy Jones (pp. 7-8, section 3); and Barton was awarded $60,000.00 against the Pedersens and Randy Jones (Id.)

9. Based upon my review of the Court file and the pleadings contained therein, it appears that title to the subject property was quieted in favor of Sheldon and Ann Fant Foreman, not Respondent/Debtor. The Announcement of Decision, prepared by the trial judge and filed within a few days after the trial, clearly reflects this. I am informed and believe, and based thereon allege, that a

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monetary award in that action. The only $60,000.00 award made therein was to Russell J. Barton.

12. I feel that Respondent/Debtor, its counsel and others are attempting to perpetrate a fraud on this Court and the Superior Court. Respondent/Debtor was an entity formed primarily for the use and benefit of Sheldon L. Foreman and Ann Fant Foreman. As indicated in the Statement (p. 3, section 1(a)(i)), they owned the subject property prior to Respondent's/Debtor's formation. Wayne and Marlene Pedersen were going to buy the subject property from the Foremans (p. 4, section 1(a)(iii)). The Pedersens were then going to transfer title to the subject property into Respondent/Debtor, the partnership (p. 4, Section 1 (a)(iv)). After escrow closed, title to the subject property was conveyed to Respondent/Debtor by a deed "without written

authority" (p. 5, section 1(a)(vi)). The Announcement says that the title (attempted to be so conveyed) "did not pass to [Respondent/Debtor]" (p. 2). The Superior Court thus determined that the transfer of title from the Foremans to the Pedersens was rescinded (p. 3, section 1). Respondent/Debtor therefore never received title to the subject Property. Because the Foremans presumably did not want to affect the personal credit or assets, Respondent/Debtor filed this bankruptcy.

I declare under penalty of perjury according to the laws of the United States and the State of California that the foregoing is true and correct.

Executed this 22nd day of November 1989, at Los Angeles, California.

/s/ Dennis Roy
DENNIS ROY

EXHIBIT "8" TO SUPPLEMENTAL DECLARATION

ANNOUNCEMENT OF TENTATIVE DECISION

FILED
JUL 21 1989

SUPERIOR COURT OF THE STATE OF CALIFORNIA

COUNTY OF ORANGE

* * *

CHAMBERS OF

WALTER W. CHARAMZA

JUDGE , RETIRED

ROY B. WOOLSEY, ESQ.
WOOLSEY, ANGELO & THATCHER
2099 San Joaquin Hills Rd.
Newport Beach, CA 92660

RICHARD D. BRADY, ESQ.
650 Town Center Dr. Ste. 1900
Costa Mesa, CA 92626

ANDO LaFORM LOPEZ, ESQ.
4486 Hamilton ST.
San Diego, CA 92116

B.F.P.,a Partnership vs PEDERSEN & CROSS-ACTION
X-54-16-04
ANNOUNCEMENT OF TENTATIVE DECISION

This is the Court's TENTATIVE DECISION. A STATEMENT OF DECISION was requested; therefore Mr. Woolsey, attorney for Plaintiffs shall prepare a pro-

posed STATEMENT OF DECISION and a PROPOSED JUDGMENT. Counsel for Defendants shall specify any controverted issues or proposals for the STATEMENT OF DECISION by August 4, 1989 by written request to the Court with a copy to Mr. Woolsey. Such requests shall be considered by Mr. Woolsey in the preparation of the PROPOSED STATEMENT OF DECISION which is to be completed along with the PROPOSED JUDGMENT and served and filed with the Court on or before August 21, 1989.

These findings of fact may to some extent be academic but are made in the event they become necessary pending finality of this action.

Wayne L. Pedersen executed the purchase agreement, the partnership agreement and each deed and trust deed on which his signature appears. He is charged with knowledge of the contents of such documents and had a contractual duty

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defendants WAYNE L. PEDERSEN and MARLENE M. PEDERSEN concerning said real property be and they are rescinded.

a) The court bases its decision on the following facts:

(i) Prior to and on August 25, 1987, plaintiff SHELDON L. FOREMAN and ANN FANT FOREMAN owned said real property; an escrow to sell to a third party was pending;

(ii) Plaintiff RUSSELL J. BARTON and said buyer agreed that RUSSELL J. BARTON remodel the house, resell it, and each participate in the profits;

(iii) Plaintiffs SHELDON L. FOREMAN and ANN FANT FOREMAN, and RUSSELL J. BARTON and defendant WAYNE L. PEDERSEN orally agreed that WAYNE L. PEDERSEN and MARLENE M. PEDERSEN buy said property and be substituted in as buyers in said escrow using coins as a down payment and pay to the FOREMANs the proceeds of a

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BARTON have seventy-five percent and the PEDERSENs twenty-five percent of the profits.

(v) In reliance upon said oral agreements referred to in (iv) above, the plaintiffs permitted the escrow to be closed on August 25, 1987; the PEDERSONs knowingly accepted the benefits of said partnership agreement and said oral agreements and were charged with knowledge of the contents and bound thereby.

(vi) The deed dated August 25, 1987 to B.F.P. was signed by WAYNE L. PEDERSEN, who also caused the name of MARLENE M. PEDERSEN to be affixed to said deed without written authority signed by MARLENE M. PEDERSEN; it was recorded on September 11, 1987.

(vii) On August 27, 1987, plaintiff B.F.P. made, executed and delivered its note and trust deed securing the note

describing SHELDON L. FOREMAN and ANN FANT FOREMAN as beneficiaries. Said trust deed was recorded on September 16, 1987.

(viii) Plaintiffs were at all times hereinabove mentioned in open, notorious, conspicuous possession of said real property;

(ix) By reason of the recording on September 11, 1987, the deed signed by WAYNE L. PEDERSEN describing him and MARLENE M. PEDERSEN as grantors and B.F.P. as grantee, the recording on September 16, 1987 of the trust deed to plaintiffs SHELDON L. FOREMAN and ANN FANT FOREMAN as beneficiaries, and of said possession, OFF-ROAD VEHICLES - RECREATION AND FAMILY CAMPGROUND, INC. and GARY DWIGHT HENIG had a duty to inquire and minimum inquiry would have discovered plaintiffs' rights and said defendants OFF-ROAD VEHICLES - RECREATION

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rights, and defendants WAYNE L. PEDERSEN, MARLENE M. PEDERSEN and OFF-ROAD VEHICLES - RECREATION AND FAMILY CAMPGROUND, INC., sought the benefits of the agreements and deeds in violation of them free and clear of the burdens thereunder and when accepting the deed to OFF-ROAD VEHICLES - RECREATION AND FAMILY CAMPGROUND, INC., it had notice of the rights of plaintiffs.

2. As to the issue of quiet title to said real property, the note secured by deed of trust held by plaintiffs SHELDON L. FOREMAN and ANN FANT FOREMAN, and said trust deed as against defendants WAYNE L. PEDERSEN, MARLENE M. PEDERSEN, OFF-ROAD VEHICLES - RECREATION AND FAMILY CAMPGROUND, INC., a California corporation, and GARY DWIGHT HENIG, the Court's decision is that title should be quieted as against defendants.

a) The court bases its decision on

the facts stated in a) of 1 above and 1 a) above is incorporated herein by reference, and that plaintiffs had and have the right to immediate possession of and title to said real property, said note and said deed of trust.

b) The legal basis for the decision is that as against defendants WAYNE L. PEDERSEN, MARLENE M. PEDERSEN, OFF-ROAD VEHICLES RECREATION AND FAMILY CAMP-GROUND, INC. and GARY DWIGHT HENIG, plaintiffs have the right to the immediate possession and title to said real property, said note and said second trust deed securing said note payable to them and OFF-ROAD VEHICLES - RECREATION AND FAMILY CAMPGROUND, INC. had constructive notice thereof and said defendants have no right, title or interest in or to said real property, note and trust deed.

3. As to the issue of damages the court's decision is that plaintiffs

SHELDON L. FOREMAN and ANN FANT FOREMAN recover $200,000.00 from defendants, WAYNE M. PEDERSEN, MARLENE M. PEDERSEN and RANDY JONES, and each of them, and that plaintiff RUSSELL J. BARTON recover $60,000.00 as against said defendants.

a) The court bases its decision on the following facts

(i) 1 a) above is hereby incorporated herein by reference including paragraphs thereof (i) through (xii).

(ii) RANDY JONES knowingly processed the deed describing WAYNE L. PEDERSEN and MARLENE M. PEDERSEN as grantors and B.F.P. as grantee, informed the notary public that he had witnessed the signature of MARLENE M. PEDERSEN when in fact he had not witnessed the signature of MARLENE M. PEDERSEN on said deed. Thereafter, he and the PEDERSENs caused the notary to affix her jurat and seal to the deed, and plaintiffs to rely on it.

(iii) The false representation by RANDY JONES that he had witnessed the signature of MARLENE M. PEDERSEN and the deed by WAYNE L. PEDERSEN and MARLENE M. PEDERSEN to OFF-ROAD VEHICLES - RECREATION AND FAMILY CAMPGROUND, INC. describing said real property proximately and legally caused the frustration of the project of the partnership to improve and resell the property.

(iv) Upon remodeling, pursuant to the partnership agreement, B.F.P. would have been able to sell the property for over $80,000.00 more than the amount of the first trust deed, the second trust deed, costs of remodeling and other costs, and RUSSELL J. BARTON would have been entitled to $60,000.00 thereof.

(v) As a direct and proximate result of said representation, said negligence, and said deed, plaintiff SHELDON L. FOREMAN and ANN FANT FOREMAN were damaged

in the sum of $200,000.00 and RUSSELL J. BARTON was damaged in the sum of $60,000.00.

b) The legal basis for the court's decision is that the negligence and false representation of RANDY JONES and the making and executing of said deed describing defendant OFF-ROAD VEHICLES - RECREATION AND FAMILY CAMPGROUND, INC. as grantee proximately caused said damages and plaintiffs are entitled to have and recover of and from said defendants, and each of them, jointly and severally, said sums.

4. As to the issue of whether or not plaintiff' claim of title was based on instruments and/or documents which were a sham or obtained by fraud, the court decides that they were not a sham or based on fraud.

a) The court bases its decision on the following facts, to wit, the deed to

B.F.P. was in fact signed by WAYNE L. PEDERSEN and defendant, MARLENE M. PEDERSEN, was bound by a contract, to wit, the partnerships agreement which was signed with her authority to convey such title and nothing was conveyed to cross-complainant OFF-ROAD VEHICLES RECREATION AND FAMILY CAMPGROUND, INC. because of the facts found in 1 a) and 2 a) above, which are incorporated herein by reference.

b) The legal basis for the decision is as stated in 2 b) and 2 b) above, which are hereby incorporated herein by reference and failure of consideration for the deed from the FOREMANs to the PEDERSENs.

5. As to the issue raised by the cross-complainant WAYNE L. PEDERSEN of whether or not WAYNE L. PEDERSEN divested B.F.P. of title by reconveyance and whether or not B.F.P. is thereby

barred from denying title is vested in the cross-complaint of OFF-ROAD VEHICLES - RECREATION AND FAMILY CAMPGROUND, INC., and the court finds that title is not vested in OFF-ROAD VEHICLES - RECREATION AND FAMILY CAMPGROUND, INC., and PEDERSENs did not divest B.F.P. of title, the court bases its decision on the following:

a) Paragraphs 1 a) and 2 a) above are hereby incorporated herein by reference.

b) The legal basis for the court's decision is that the partner could not convey said property of the partnership, he had already conveyed said property to the partnership, and his deed to OFF-ROAD VEHICLES - RECREATION AND FAMILY CAMPGROUND, INC. had no effect.

6. As to the issue raised by the allegations by cross-complainant that B.F.P. acquired property by fraud or

forgery, the court decides B.F.P. did not acquire property by fraud or forgery.

a) The court basis its decision on the facts stated in 1 a) and 1 b) above, which are hereby incorporated hereby by reference, and on the fact that there was no proof of any fraud or forgery by cross-defendant B.F.P.

b) The legal basis of the court's decision is that there was no evidence of misrepresentation, fraud or forgery by any plaintiff.

7. On the issue of whether or not SHELDON L. FOREMAN and RUSSELL J. BARTON conspired to defraud cross-complainant WAYNE L. PEDERSEN, defendant MARLENE M. PEDERSEN, or either of them, the Court finds that there was no such conspiracy to defraud.

a) The court bases its decision on the fact that there was no evidence of a conspiracy.

b) The legal basis of the court's decision is that conspiracy can be proven only by evidence of a conspiracy, and there was none.

8. As to the issue of whether or not SHELDON L. FOREMAN and RUSSELL J. BARON conspired to deprive cross-complainant of possession of the real property, the court finds that they did not conspire.

a) The court bases its decision on the facts contained in 1 a) and 2 a) above, which are hereby incorporated herein by reference and that B.F.P. permitted the FOREMANs to remain in possession.

b) The legal basis of the court's decision is that there was no conspiracy to do wrong or violate any right of cross-complainant, and possession by SHELDON L. FOREMAN was with the right, title and interest, and the consent of

cross-complainant was therefore not required.

9. As to the issue of whether or not plaintiffs' complaint and causes of action state facts sufficient to constitute a cause of action, the court's decision is that they do.

a) The court basis its decision on the facts contained in paragraphs 1 a), 2 a), 3 a), 4 a), and 5 a), said facts were substantially pleaded and said subparagraphs are hereby incorporated herein by reference.

b) The legal basis for the court's decision is as contained in paragraphs 1 b), 2 b), 3 b), 4 b) and 5 b) and are hereby incorporated herein by reference.

10. As to the issue of whether or not the action is barred in whole or in part by the statute of limitations, the court decides that they were not so barred.

a) The court bases its decision on the following facts and the acts complained of occurred in 1987, the above entitled action was filed on November 24, 1987.

b) The legal basis for the court's decision is that the applicable statute required the time lapsing between the arising of the cause of action and the filing of the complaint of to be three years or more, and the time lapsed here was less than one year.

11. As to the issue o whether or not the damages were caused by plaintiffs acts, omission, carelessness or negligence and recovery barred, the court finds that they were not so barred.

a) The court bases factual basis for the court's decision is contained in paragraphs 1 a), 2 a), 3 a), 4 a) and 5 a) above are hereby incorporated herein by reference.

b) The legal basis for the court's decision is that plaintiffs' reliance on the facts were justified and the liability of cross-complainants is based on an intentional misrepresentation as well as a negligent misrepresentation that he had witnessed the signature of MARLENE M. PEDERSEN.

The clerk was ordered to enter judgment in accordance with the foregoing and that plaintiffs recover costs.

Dated: October 12, 1989

/s/Walter W. Charamza

WALTER W. CHARAMZA

JUDGE OF THE SUPERIOR COURT

ASSIGNED

IMPERIAL'S ANSWER TO COMPLAINT

TO DECLARE TRANSFER ETC.

* * *

UNITED STATES BANKRUPTCY COURT

CENTRAL DISTRICT OF CALIFORNIA

In re:	Bk. No. SA 89-06771 JR
BFP, a Partnership, Debtor.	Adv. No. SA 89-0977 JR Chapter 11

BFP, A Partnership, Plaintiff, vs. IMPERIAL SAVINGS & LOAN ASSOCIATION, a California corporation, et al, Defendants.	ANSWER TO COMPLAINT TO DECLARE TRANSFER OF REAL PROPERTY NULL AND VOID, AND TO VACATE & SET ASIDE TRUSTEE'S DEED OF TRUST AND FOR DAMAGES

Defendant IMPERIAL SAVINGS ASSOCIATION (hereinafter "ISA"), for itself and itself along, answers the Complaint to Declare Transfer of Real Property Null and Void, and to Vacate and Set Aside Trustee's Deed of Trust and For Damages

filed by Plaintiff in this matter as follows:

1. ISA admits the allegations of paragraph 1.

2. ISA lacks sufficient information or belief to respond to the allegations contained in paragraph 2 of the Complaint and, on that basis, denies each and every allegation contained in this paragraph, and the whole thereof.

3. ISA admits the allegations of paragraph 3.

4. ISA lacks sufficient information or belief to respond to the allegations contained in paragraph 4 of the Complaint and, on that basis, denies each and every allegation contained in this paragraph, and the whole thereof.

5. ISA lacks sufficient information or belief to respond to the allegations contained in paragraph 5 of the Complaint and, on that basis, denies each and every

allegation contained in this paragraph, and the whole thereof.

6. ISA lacks sufficient information or belief to respond to the allegations contained in paragraph 6 of the Complaint and, on that basis, denies each and every allegation contained in this paragraph, and the whole thereof.

7. ISA lacks sufficient information or belief to respond to the allegations contained in paragraph 7 of the Complaint and, on that basis, denies each and every allegation contained in this paragraph, and the whole thereof.

8. ISA lacks sufficient information or belief to respond to the allegations contained in paragraph 8 of the Complaint and, on that basis, denies each and every allegation contained in this paragraph, and the whole thereof.

9. ISA lacks sufficient information or belief to respond to the allegations

contained in paragraph 9 of the Complaint and, on that basis, denies each and every allegation contained in this paragraph, and the whole thereof.

10. ISA lacks sufficient information or belief to respond to the allegations contained in paragraph 10 of the Complaint and, on that basis, denies each and every allegation contained in this paragraph, and the whole thereof.

11. ISA lacks sufficient information or belief to respond to the allegations contained in paragraph 11 of the Complaint and, on that basis, denies each and every allegation contained in this paragraph, and the whole thereof.

12. ISA lacks sufficient information or belief to respond to the allegations contained in paragraph 12a of the Complaint and, on that basis, denies each and every allegation contained in this paragraph, and the whole thereof.

13. ISA admits the allegations contained in paragraph 12b of the Complaint.

14. ISA lacks sufficient information or belief to respond to the allegations contained in paragraph 12c of the Complaint and, on that basis, denies each and every allegation contained in this paragraph, and the whole thereof.

15. ISA lacks sufficient information or belief to respond to the allegations contained in paragraph 12d of the Complaint and, on that basis, denies each and every allegation contained in this paragraph, and the whole thereof.

16. ISA lacks sufficient information or belief to respond to the allegations contained in paragraph 12e of the Complaint and, on that basis, denies each and every allegation contained in this paragraph, and the whole thereof.

17. ISA lacks sufficient information or belief to respond to the allegations contained in paragraph 13 of the Complaint and, on that basis, denies each and every allegation contained in this paragraph, and the whole thereof.

18. ISA lacks sufficient information or belief to respond to the allegations contained in paragraph 14 of the Complaint and, on that basis, denies each and every allegation contained in this paragraph, and the whole thereof.

19. ISA lacks sufficient information or belief to respond to the allegations contained in paragraph 15 of the Complaint and, on that basis, denies each and every allegation contained in this paragraph, and the whole thereof.

20. In responding to paragraph 16 of Trustee's Complaint, ISA admits that it recorded a Notice of Default and Election to Sell against the subject Property. ISA admits that a Trustee's

Sale of the subject Property was originally scheduled for December 29,1988. ISA lacks sufficient information or belief to respond to the allegations contained in paragraph 16 of the Complaint and, on that basis, denies each and every allegation contained in this paragraph, and the whole thereof.

21. ISA admits that an involuntary petition was filed by Off Road Vehicles in the Central District of California. ISA lacks information or belief as to whether Off Road Vehicles alleged BFP was insolvent.

22. ISA admits that the bankruptcy petition stated BFP's address was 3303 F-1 Harbor Boulevard, Costa Mesa, California. ISA lacks information or belief as to whether the address was incorrect.

23. In responding to paragraph 19, ISA admits that it attended the hearing on May 11, 1989. ISA admits that Russell

Barton was present at the hearing. ISA admits that Russell Barton was represented by Roy B. Woolsey who was also present at the hearing. ISA admits the Off Road Vehicles was represented by Armando Lopez, Esq., who was present at the hearing. ISA lacks sufficient information or belief to respond to the allegations contained in paragraph 19 of the Complaint and, on that basis, denies each and every allegation contained in this paragraph, and the whole thereof.

24. ISA lacks sufficient information or belief to respond to the allegations contained in paragraph 20 of the Complaint and, on that basis, denies each and every allegation contained in this paragraph, and the whole thereof. However, admits that it attended the hearing on May 11, 1989.

25. ISA admits the allegations of paragraph 21.

26. ISA lacks sufficient information or belief to respond to the allegations contained in paragraph 22 of the Complaint and, on that basis, denies each and every allegation contained in this paragraph, and the whole thereof.

27. Defendant denies, generally and specially, each, every, and all of allegations contained in paragraph 23 therein and the whole thereof.

28. In response to paragraph 24 of Plaintiff's complaint, ISA admits that said notice stated there would be a hearing on said motion on June 12, 1989. ISA admits that the Bankruptcy Court made an Order Granting said Motion. ISA admits that BFP did not appear at said hearing. ISA admits that it forwarded a Judgment and Order Vacating Automatic Stay to the Bankruptcy Court together with an affidavit that BFP was served by mailing to 3033 F-1 Harbor Boulevard,

Costa Mesa, CA. Defendant denies, generally and specially, each, every, and all of allegations contained in paragraph 24 therein and the whole thereof.

29. ISA lacks sufficient information or belief to respond to the allegations contained in paragraph 29 of the Complaint and, on that basis, denies each and every allegation contained in this paragraph, and the whole thereof.

30. Defendant denies, generally and specially, each, every, and all of allegations contained in paragraph 26 therein and the whole thereof.

31. ISA lacks sufficient information or belief to respond to the allegations contained in paragraph 27 of the Complaint and, on that basis, denies each and every allegation contained in this paragraph, and the whole thereof.

32. ISA admits that the Trustee's Sale was conducted on July 12, 1989. ISA

admits that the subject property was sold for $433,000.00. Defendant denies, generally and specially, each, every, and all of allegations contained in paragraph 28 therein and the whole thereof.

33. ISA lacks sufficient information or belief to respond to the allegations contained in paragraph 29 of the Complaint and, on that basis, denies each and every allegation contained in this paragraph, and the whole thereof.

34. ISA lacks sufficient information or belief to respond to the allegations contained in paragraph 30 of the Complaint and, on that basis, denies each and every allegation contained in this paragraph, and the whole thereof.

35. ISA admits that the foreclosure sale was conducted on or around July 12, 1989. Defendant denies, generally and specially, each, every, and all of the allegations contained in paragraph 31

therein and the whole thereof.

36. ISA lacks sufficient information or belief to respond to the allegations contained in paragraph 32 of the Complaint and, on that basis, denies each and every allegation contained in this paragraph, and the whole thereof.

AFFIRMATIVE DEFENSES

As and for separate and affirmative defenses to the causes of action alleged in the Complaint, Defendant IMPERIAL SAVINGS ASSOCIATION alleges as follows:

FIRST AFFIRMATIVE DEFENSE

37. The Complaint, and each cause of action contained therein, fails to set forth facts sufficient to state a cause of action against this answering Defendant.

SECOND AFFIRMATIVE DEFENSE

38. Plaintiff, by its conduct, has waived any and all right to the recovery prayed for herein.

THIRD AFFIRMATIVE DEFENSE

39. Plaintiff, by its conduct, is estopped from seeking the relief prayed for herein.

FOURTH AFFIRMATIVE DEFENSE

40. Plaintiff's recovery is barred by the doctrine of unclean hands. Plaintiff and Plaintiff's counsel were aware that the involuntary Chapter 11 petition filed against Plaintiff by Off Road Vehicles had been dismissed at BFP's own request by Order entered June 14, 1989 (See Exhibit "A" attached hereto). No Automatic Stay remained in effect after dismissal of the involuntary petition. Furthermore, BFP has filed a Complaint in the Orange County Superior Court on August 18,1989 naming ISA as a party Defendant, which Complaint (see Exhibit "B") is almost identical to the Complaint filed in the instant bankruptcy proceeding. Plaintiff has continued to prose-

cute the Superior Court action even after filing the within Chapter 11 petition and the instant adversary action, and while taking advantage of the protection of this Court (Attached As Exhibit "C" is the At Issue Memorandum prepared by Mr. Woolsey on December 20,1989, which was served on the same date).

FIFTH AFFIRMATIVE DEFENSE

41. The within Complaint has been filed by Plaintiff and its counsel in bad faith and both Plaintiff and Plaintiff's counsel have violated Bankruptcy Rule of Procedure 9011(a) in filing the complaint.

WHEREFORE, DEFENDANT PRAYS:

1. That Plaintiff take nothing by its Complaint.

2. That Plaintiff's Complaint be dismissed with prejudice.

3. For costs of suit herein incurred.

4. For reasonable attorneys' fees awarded to Defendant according to proof;

5. For sanctions against Plaintiff and Plaintiff's counsel according to proof.

6. For such other and further relief as the Court deems just and proper.

DATED: January 18, 1990

LAW OFFICES OF EDWARD G. SCHLOSS

By /s/ Mary C. Caroom

* * *

[NO PROOF OF SERVICE ATTACHED]

STATEMENT CONCERNING MINUTES OF COURT FOR FEBRUARY 6, 1990

The minutes of court are not in the court file and we have been unable to locate the same. We verily believe that the abbreviated entry which appears in the docket entries hereinabove in this Appendix accurately reflects a statement contained in the minutes.

DEFENDANT IMPERIAL SAVINGS ASSOCIATION'S NOTICE OF MOTION AND MOTION FOR JUDGMENT ON THE PLEADINGS

FILED APR 5 90

* * *

UNITED STATES BANKRUPTCY COURT

CENTRAL DISTRICT OF CALIFORNIA

In re:	Bk. No. SA 89-06771 JR
BFP, a Partnership, Debtor.	Adv. No. SA 89-0977 JR Chapter 11

BFP, A Partnership, Plaintiff, vs. IMPERIAL SAVINGS & LOAN ASSOCIATION, Defendants.	NOTICE OF MOTION AND MOTION FOR JUDGMENT ON THE PLEADINGS [FRPC 12(C)]; POINTS AND

* * *

TO PLAINTIFF AND ITS ATTORNEY OF RECORD:

PLEASE TAKE NOTICE that on April 27, 1990 at 11:30 a.m., or as soon thereafter as the matter may be heard in the above-entitled court, before the Honorable John

Ryan, United States Bankruptcy Judge, presiding in Courtroom 520 in the United States Bankruptcy Court located at 34 Civic Center Plaza, Santa Ana, California, Defendant, IMPERIAL SAVINGS & LOAN ASSOCIATION, will and hereby does move the court for Judgment on the pleadings on the claim upon which relief can be granted, on the grounds that no transfer occurred within one (1) year of the filing of the Chapter 11 petition.

The motion will be based on this Notice of Motion and Motion, the Memorandum of Points and Authorities filed herewith, and the pleadings and papers filed herein.

DATED: March 21, 1990

LAW OFFICES OF EDWARD G. SCHLOSS

/s/ Mary C. Caroom
MARY C. CAROOM, ESQ.
Attorneys for Movant/Defendant
IMPERIAL SAVINGS & LOAN
ASSOCIATION

[NO PROOF OF SERVICE IN THE RECORD]

DEFENDANT IMPERIAL SAVINGS ASSOCIATION'S

NOTICE OF MOTION AND MOTION FOR

SUMMARY JUDGMENT

FILED
APR 5 3:54PM '90
CLERK U.S. BKCY COURT
CENTRAL DIST. OF CALIF.

* * *

UNITED STATES BANKRUPTCY COURT

CENTRAL DISTRICT OF CALIFORNIA

In re:	Bk. No. SA 89-06771 JR
BFP, a Partnership, Debtor.	Adv. No. SA 89-0977 JR Chapter 11
BFP, A Partnership, Plaintiff, vs. IMPERIAL SAVINGS & LOAN ASSOCIATION, a California corporation, PAUL OSBORNE; WILLIAM LITTLE; DENNIS ROY; ARTHUR RITZ; JOSE CRUZ; RICHARD MARCY; and DOES 1 TO 10, Defendants.	DEFENDANT IMPERIAL SAVINGS ASSOCIATION'S NOTICE OF MOTION AND MOTION FOR SUMMARY JUDGMENT Hearing - DATE: April 27, 1990 TIME: 11:30 a.m. PLACE:Courtroom 520

TO PLAINTIFF AND ITS ATTORNEY OF RECORD:

PLEASE TAKE NOTICE that on April 27, 1990 at 11:30 a.m., or as soon thereafter as the matter may be heard in the above-entitled court, before the Honorable John Ryan, United States Bankruptcy Judge, presiding in Courtroom 520 in the United States Bankruptcy Court located at 34 Civic Center Plaza, Santa Ana, California, Defendant, IMPERIAL SAVINGS & LOAN ASSOCIATION, will and hereby does move the court for Summary Judgment on the ground that there is no issue as to any material fact and that the moving party is entitled to judgment as a matter of law for the reason that no transfer occurred within one (1) year of the filing of the Chapter 11 petition as is required in order to state a cause of action pursuant to 11 U.S.C. Section 548(a)(2).

This motion is based upon this Notice of Motion and Motion, the accompanying Memorandum of Points and Authorities, all pleadings and papers on file in this action, including the Motion for Judgment on the Pleadings filed concurrently herewith, and upon such other matters as may be presented to the Court at the time of the hearing.

DATED: March 27, 1990

LAW OFFICES OF EDWARD G. SCHLOSS

By: /s/ Mary C. Caroom
MARY C. CAROOM, ESQ.
Attorneys for Movant/Defendant
IMPERIAL SAVINGS & LOAN ASSOCIATION

[NO PROOF OF SERVICE IN THE RECORD]

DECLARATION OF TONI SCANDLYN

* * *

UNITED STATES BANKRUPTCY COURT

CENTRAL DISTRICT OF CALIFORNIA

In re	Bk. No. SA 89-06771 JR
BFP, a Partnership,	Adv. No. SA 89-0977 JR
Debtor.	Chapter 11

BFP, a Partnership,	DECLARATION OF TONI SCANDLYN IN SUPPORT OF MOTION FOR JUDGMENT ON PLEADINGS [FCRP 12(c); BR 7012] AND FOR SUMMARY JUDGMENT
Plaintiff,	
vs.	
IMPERIAL SAVINGS & LOAN ASSOCIATION, a California corporation;	Continued Hearing -- Date: May 21, 1990 Time: 11:30 a.m. Place: U.S. Bankruptcy Court 34 Civic Center Plaza Santa Ana, CA Courtroom 520
Defendant.	

DECLARATION OF TONI SCANDLYN

I, TONI SCANDLYN, declare and state as follows:

1. As to the following facts, I now them to be of my own knowledge, and if called upon to testify herein, I

could and would testify competently to those facts.

2. I am an employee of IMPERIAL SAVINGS ASSOCIATION, Defendant herein, and I am the person familiar with the first trust deed loan and the foreclosure of the subject property.

3. Movant/Defendant Imperial Savings Association ("Imperial" herein) was the payee of a promissory note dated August 4, 1987 in the principal amount of $356,250.00 which was secured by a deed of trust thereinafter "trust deed") in the first position encumbering real property generally described as 225 Via Genoa, Newport Beach, California. True and correct copies of said note and trust deed are attached hereto as Exhibits "A" and "B" respectively. Imperial was the successor in interest to Loan Marketing and Brokers Services, Inc., the original beneficiary under the subject

trust deed by assignment recorded August 25, 1987 (Exhibit "C").

4. When the trust deed loan went into default Imperial elected to initiate foreclosure proceedings. A Notice of Default and Election to Sell was recorded on July 29, 1988. A true and correct copy of said Notice of Default is attached hereto as Exhibit "D".

5. A Trustee's Sale of the subject property was originally scheduled for December 29, 1988. A true and correct copy of the Notice of Trustee's Sale is attached hereto as Exhibit "E". Notice of the sale was published once a week for three consecutive weeks as required by the laws of the State of California.

6. Said Trustee's Sale was postponed from time to time when Imperial learned that, on or around December 21, 1988, an involuntary Chapter 11 Bank-

ruptcy proceeding, case number SA 88-07521 JR, had been commenced against Plaintiff/Debtor, BFP, a Partnership ("BFP" herein) by Off-Road Vehicles.

7. After ascertaining that the Bankruptcy case had been dismissed, a Trustee's Sale of the property was conducted on July 12, 1989. The property was sold to Paul Osborne, William Little, Dennis Roy, Arthur Ritz, Jose Cruz and Richard Marcz for $433,600.00. A cash payment was tendered by the purchasers immediately following the sale. A true and correct copy of the Trustee's Deed Upon Sale is attached hereto as Exhibit "F".

8. After deducting $421,815.72, representing a complete payoff of the debt secured by the trust deed plus costs of sale, there remained $11,784.28 in surplus proceeds.

9. Imperial did not have any busi-

ness relationship with the third party purchasers prior to the sale, not did Imperial receive any benefit by virtue of the fact that the property was purchased by a third party Trustee's Sale.

I declare under penalty of perjury that the foregoing true and correct.

Executed this 27th day of April, 1990, at San Diego, California.

TONI SCANDLYN

[SEPARATE PROOF OF SERVICE

DN 27, OMITTED IN REPRODUCING]

DECLARATION OF MARY C. CAROOM

FILED MAY 7, 1990 (DN24)

* * *

UNITED STATES BANKRUPTCY COURT

[illegible]YJRC.

BFP, a Partnership, Plaintiff, vs. IMPERIAL SAVINGS & LOAN ASSOCIATION, a California corporation, Defendant.	CAROOM IN SUPPORT OF MOTION FOR JUDGMENT ON THE PLEADINGS [FRCP 12(c); BR 7012] AND FOR SUMMARY JUDGMENT Continued Hearing - Date: May 21, 1990 Time: 11:30 a.m. Place: U.S.Bankruptcy Court 34 Civic Center Plaza Santa Ana, CA Courtroom 520

I, MARY C. CAROOM, declare and state as follows:

1. As to the following facts, I know them to be true of my own knowledge, and if called upon to testify herein, I could and would testify competently to those facts.

2. I am the attorney of record for Movant herein, and I am the person most familiar with the ongoing State Court and

Bankruptcy Court litigation herein.

3. Sometime prior to July, 1989, Respondent/Debtor BFP, a Partnership (BFP" herein) and others filed a Superior Court action as to the subject property in the Superior Court for the County of Orange (Case No. X-54-16-04). Imperial Savings was not a party to that action. BFP's present counsel, Roy Woolsey, represented BFP and others therein.

4. I have reviewed the Superior Court file with respect to that action.

5. A trial was apparently held in the aforementioned action on or about July 17, 1989. On July 21, 1989, an Announcement of Tentative Decision, apparently prepared by the Superior Court Judge who conducted the trial, was filed in that action. A true and correct certified copy thereof is attached hereto as Exhibit "A" and incorpo-

rated herein by reference. I have compared this copy with the original in the court file, and it is identical to the original.

6. The Announcement specifically states that: (i) the conduct of the Pedersons requires the rescission of the Foreman's deed as between the parties; (p. 2); (ii) title to the subject Property was quieted in favor of Sheldon L. Foreman and Ann Fant Foreman (p. 3); and (iii) the Foremans received a monetary award of $200,000.00, while Russell J. Barton received an award of $60,000.00 (p. 3). Nowhere in the Statement of Tentative Decision does it say that BFP shall have an interest in the property.

7. On October 12, 1989, a Statement of Decision was filed in the aforementioned action. It was apparently prepared by Roy B. Woolsey, BFP's coun-

sel. A true and correct certified copy thereof is attached hereto as Exhibit "B" and incorporated herein by reference. I have compared this copy with the original in the Court file, and it is identical to the original.

8. This Statement of Decision specifically states that: transfer of title to the subject property by Sheldon Leroy Foreman and Ann Fant Foreman to Wayne and Marlene Pederson was rescinded (pp. 2-3, Section 1); the deed from the Pederson's to BFP was signed without the authority of Marlene Pederson (p. 5, Section 1(a)(vi); BFP was aware of the default owed to Imperial Savings, its foreclosure proceedings and the trustee's sale held on July 12, 1989 (p. 6, Section 1(a)(xii); "BFP, a Partnership" consists of Russell J. Barton, and Wayne and Marlene Pederson (p. 4, Section 1(a)(iv)); the Foremans

were awarded $200,000.00 against the Pedersons and Randy Jones (pp. 7-8, Section 3) and Barton was awarded $60,000.00 against the Pedersons and Randy Jones (Id.) Nowhere in the Statement of Decision does it state that title is quieted in favor of BFP.

9. On October 12, 1989 a Judgment was entered in the aforementioned action. It was apparently prepared by Roy B. Woolsey, BFP's counsel. A true and correct certified copy thereof is attached hereto as Exhibit "C" and incorporated herein by this reference. I have compared this copy with the original in the court file, and it is identical to the original.

10. This judgment specifically states that: as between the Foremans and the defendants, the deed describing the Foremans as grantors and the Pedersons as grantees is rescinded (pp.2-3);

that the Pedersons have no right, title, estate or interest in or to said real property (p.3); and that plaintiffs BFP and the Foremans are the sole owners of said real property in fee simple (p.3).

11. Based upon my review of the Court file and pleadings contained therein, it appears that title to the subject property was quieted in favor of Sheldon and Ann Fant Foreman, not BFP. The Announcement of Tentative Decision prepared by the trial judge and filed within a few days of the trial, clearly reflects this as does the Statement of Decision prepared by Mr. Woolsey. I am informed and believe, and based thereon allege, that the judgment is incorrect and inaccurate when it declares BFP and the Foremans are the sole owners of the subject real property.

12. BFP's Schedule B-3 filed in the underlying bankruptcy herein states

that BFP owns a $60,000.00 judgment rendered in the aforementioned Superior Court action. As indicated by the Announcement and Statement, however, BFP did not receive any monetary award in that action. The only $60,000.00 award made therein was to Russell J. Barton.

* * *

I declare under penalty of perjury according to the laws of the United States and the State of California that the foregoing is true and correct.

Executed this 1ST day of May, 1990, at Los Angeles, California.

/s/ MARY C.CAROOM

[P'S & A'S OMITTED IN PRINTING]

[SEPARATE PROOF OF SERVICE

DN 27 OMITTED IN REPRODUCING]

EXHIBIT A

TENTATIVE DECISION OF STATE COURT ACTION

APPEARS AS EXHIBIT "8" TO EXHIBIT "C"

OF MOTION TO DISMISS ETC.

It is incorporated herein by reference.

EXHIBIT B

STATEMENT OF DECISION IN STATE COURT

APPEARS AS EXHIBIT "9" TO EXHIBIT "C"

OF MOTION TO DISMISS ETC.

It is incorporated herein by reference.

EXHIBIT "C" TO DECLARATION OF CAROOM

FILED MAY 7 1990 (DN 24)

FILED OCT 12 1989
GARY L. GRANVILLE, County Clerk

* * *

IN THE SUPERIOR COURT OF CALIFORNIA

IN AND FOR THE COUNTY OF ORANGE

B.F.P., a Partnership, et al.,

Plaintiffs,

vs.

WAYNE L. PEDERSEN, et al.,

Defendants.

Case No. X-54 16 04

JUDGMENT

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* * *

The above-entitled cause came on regularly for trial on July 17, 1989, in Department 91 of the above-entitled Court, the Honorable Walter W. Charamza, presiding without a jury, a jury having been waived, and was tried on that date, and on July 18, 1989, Roy B. Woolsey, and Woolsey, Angelo & Thatcher by Roy B. Woolsey, appeared as counsel for plain-

tiffs and cross-defendants B.F.P., a Partnership, RUSSELL J. BARTON, SHELDON L. FOREMAN and ANN FANT FOREMAN, and Armando LaForm Lopez, Esq., appeared as counsel for defendant and cross-complainant OFF-ROAD VEHICLES - RECREATION AND FAMILY CAMPGROUND, INC., a California corporation, and defendant GARY DWIGHT HENIG, and Richard D. Brady, Esq., appeared for defendant RANDY JONES, and the default of WAYNE L.PEDERSEN and MARLENE M. PEDERSEN has been entered.

Oral and documentary evidence was introduced on behalf of the respective parties and the cause was argued and submitted for decision. The Court, has considered the evidence, heard the arguments of counsel and has made its Statement of Decision.

IT IS ORDERED, ADJUDGED AND DECREED that as between SHELDON LEROY FOREMAN, ANN FANT FOREMAN, and defendants WAYNE L.

PEDERSEN, MARLENE M. PEDERSEN, OFF-ROAD VEHICLES - RECREATION AND FAMILY CAMP-GROUND, INC. and GARY DWIGHT HENIG, the deed describing SHELDON L. FOREMAN and ANN FANT FOREMAN as grantors, and WAYNE L. PEDERSEN and MARLENE M. PEDERSEN as grantees, and describing real property in the City of Newport Beach, County of Orange, State of California, described more particular as follows:

Lots 946 and 947 of Tract No. 907 as shown on a Map recorded in book 28, pages 25 to 36 inclusive of Miscellaneous Maps, together with the Northwesterly 17 feet of that Portion of Via Genoa adjoining said land on the Southeast abandoned by resolution of the City Council of the City of Newport Beach, a certified copy of which resolution was recorded June 10, 1953, in Book 2518, page 348, Official Records,

in the office of the county recorder of said county.

also known as 225 Via Genoa, Newport Beach, California, and the escrow instructions between said plaintiffs and defendants WAYNE L. PEDERSEN and MARLENE M. PEDERSEN concerning said real property, be and they are rescinded.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that plaintiff B.F.P., SHELDON L.FOREMAN and ANN FANT FOREMAN are the sole owners of said real property in fee simple, and SHELDON L. FOREMAN and ANN FANT FOREMAN are the owners of the note secured by deed of trust describing said real property and said SHELDON L. FOREMAN and ANN FANT FOREMAN as beneficiaries, dated September 16, 1987 and defendants WAYNE L. PEDERSEN, MARLENE M. PEDERSEN, OFF-ROAD VEHICLES - RECREATION AND FAMILY CAMPGROUND, INC., a California corporation, and GARY DWIGHT HENIG, have no

right, title, estate or interest in or to or lien on said real property, said note and in said trust deed.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that plaintiffs SHELDON L. FOREMAN and ANN FANT FOREMAN recover $200,000.00 from defendants, WAYNE L. PEDERSEN, MARLENE M. PEDERSEN and RANDY JONES, and each of them, and that plaintiff RUSSELL J. BARTON recover $60,0000.00 from defendants, WAYNE L. PEDERSEN, MARLENE M. PEDERSEN and RANDY JONES, and each of them.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that the plaintiffs and cross-defendants recovery their costs of suit incurred herein in the sum of $_____.

The clerk is ordered to enter judgment in accordance with the foregoing.

Dated: October 12, 1989

/s/ Walter W. Charamza
WALTER W. CHARAMZA
JUDGE OF THE SUPERIOR COURT
ASSIGNED

EXHIBIT "D" TO DECLARATION OF CAROOM

FILED JUNE 13 1989
ENTERED JUNE 14 1989

* * *

UNITED STATES BANKRUPTCY COURT

CENTRAL DISTRICT OF CALIFORNIA

In re	CASE NO. SA 88-07521-JR
BFP, a Partnership	DISMISSAL OF PETITION FOR ADJUDICATION OF INVOLUNTARY BANKRUPTCY
Debtor.	

* * *

The petition of OFF-ROAD VEHICLES-RECREATION AND FAMILY CAMPGROUND, INC. for an adjudication of the above named debtor as a debtor entitled to relief under Chapter 11 of the Bankruptcy Laws of the United States, came on regularly for hearing before the Honorable John Ryan, Bankruptcy Judge presiding on May 11, 1989, Armando LaForm Lopez, Esq., appearing for OFF-ROAD VEHICLES - RECREATION AND FAMILY CAMPGROUND, INC., Russell Barton, partner of BFP, being present in

open Court, and Roy B. Woolsey appearing for said Russell Barton. Plaintiff, in its opening statement claimed to be a partner entitled to bring a proceeding under 11 U.S.C. Section 303(b)(3)(A). The Court finds from the statements made in the opening statement that it is not such a partner, and good cause appearing therefor,

IT IS HEREBY ORDERED, ADJUDGED AND DECREED that the Petition for Adjudication of OFF-ROAD VEHICLES RECREATION AND FAMILY CAMPGROUND INC. be and the same is hereby dismissed.

Dated: June 13, 1989

/s/ John E. Ryan
JUDGE OF BANKRUPTCY COURT

Submitted by:

ROY B. WOOLSEY, ESQ.,

/s/ Roy B. Woolsey
ROY B. WOOLSEY
Attorneys for RUSSELL BARTON

DECLARATION OF ROY B. WOOLSEY,

RUSSELL BARTON AND ROY FOREMAN

FILED
90 MAY 17 P 2:26
CLERK U.S. BANKRUPTCY COURT

* * *

UNITED STATES BANKRUPTCY COURT

FOR THE CENTRAL DISTRICT OF CALIFORNIA

In re: BFP, a Partnership, Debtor.	CASE NO. SA 89 06771 JR Adv. No. SA 89-0977 JR
BFP, a Partnership, Plaintiff, vs. IMPERIAL SAVINGS & LOAN ASSOCIATION, a California corporation; Defendants.	DECLARATION OF ROY B. WOOLSEY, RUSSELL BARTON, AND SHELDON L. FOREMAN IN FURTHER SUPPORT OF MOTION FOR CONTINUANCE AND IN OPPOSITION TO MOTION FOR SUMMARY JUDGMENT AND JUDGMENT ON THE PLEADINGS * * *

DECLARATION OF ROY B. WOOLSEY

I, ROY B. WOOLSEY, certify and declare that:

1. I am the attorney for Debtor in the above entitled matter.

2. I have personal knowledge of the following facts, except those to which I say I verily believe, and, if called to testify, could and would competently do so as to the following facts.

3. The $11,784.27 surplus of the bid over the complete payoff of the deed of trust referred to in the Declaration of Tony Scandlyn, page 3 lines 13-15 has never been tendered to the Debtor or to the Foremans, the holder of the junior trust deed.

4. In the Declaration of Mary C. Caroom it is stated at page 2, lines 27 to page 3, lines 2, that nowhere in the Statement of Decision does it say that BFP shall have an interest in the property. There was no issue as to BFP's interest in the property presented to the Court. The Foremans and BFP were plaintiffs and they claimed the property as against the defendants. There was no

claim as to who had title to the property as between the Foremans and BFP.

5. At page 3, lines 10-23, it is stated that the transfer of the property by the Foremans to the Pedersens was rescinded. The Statement of Decision did not have before it the issue of whether or not the rescission was as between the plaintiffs, it merely had to do with whether or not the plaintiffs had a right to rescind as against the defendants. The defendants in that case were the Pedersens, and Off-Road Vehicles.

6. At page 4, lines 6-8, she states that plaintiffs BFP and the Foremans were the sole owners of the property. That was true. that was the finding of the Court.

7. At page 4, lines 11-12, she states that it appears that title to the property was quieted in favor of the Foremans and not BFP. The title was

quieted in favor of plaintiffs Foreman as against the defendants. There was no showing the BFP did not have an interest in the property. I verily believe that BFP had contractual rights with respect to the property independently of the deed to the Pedersens.

8. On page 4, paragraph 12 of her affidavit she states that BFP's Schedule B-3 contained a statement that BFP had a claim for $60,000.00 against the Pedersens and she states that the judgment was not in favor of BFP but was in favor of RUSSELL J. BARTON. She is correct, but our error in the schedule would seem to make no difference in the above entitled adversary proceeding.

9. At page 4, line 13, Ms. Caroom makes an affidavit as to her feeling to the effect that I and others are perpetrating a fraud on the Court. Her feeling is irrelevant but her feeling

happens to be incorrect. BFP and others interested in BFP's position are not attempting to perpetrate a fraud on any Court.

10. On page 5, Mr. Caroom states that in the motion for relief from automatic stay in Case No. SA 88-07521 by Imperial Savings "BFP was served with all pleadings in the proceeding at the address stated in the Court record and file." She served BFP at the address given in the involuntary Petition. There may have been a record in the clerk's office using that address, however, she was personally present on May 11, 1989 when I appeared for Russell Barton, a partner of BFP who was acting for it, and argued against the petition for involuntary bankruptcy which had been filed by Off-Road, claiming to be a successor to the Pedersens partners. She attaches the order dismissing a case as Exhibit D. As

a part of said Exhibit D, there is the declaration of Lee Bradford that Mary Caroom was served with the proposed order on May 26, 1989. The card in upper left corner of the first page shows Roy B. Woolsey with the address as attorney for Russell Barton. BFP's answer to the petition for adjudication showed BFP's correct address. Nevertheless, her application for an order vacating the automatic stay was without any service on or notice to me and without any service at the actual address of the Debtor. It is requested that the court take judicial notice of that fact. The Debtor did not receive the notice. It is the practice of the Post Office to return to the sender postage paid mail that is not delivered. I verily believe that the notice was returned by the Post Office to the sender. The sender made no attempt to notify the Debtor, its partner or me.

If the Debtor, Russell Barton or I had received the notice, then the Debtor would have known that Imperial intended to have the sale and Debtor would have inquired as to the date of the sale. The conduct of Imperial is what has given rise to the problems of the Debtor. I declare under penalty of perjury that the foregoing is true and correct, and that this declaration was executed this 17th day of May, 1990, at Newport Beach, California.

/s/ Roy B. Woolsey
ROY B. WOOLSEY

DECLARATION OF RUSSELL BARTON

RUSSELL BARTON, certifies and declares that:

1. At all times during the existence of BFP, a Partnership, I have been a partner. The partnership was formed on or about August 26,1987 with Wayne Pedersen and Marlene Pedersen and

me as partners. However, later she said she did not sign the Partnership Agreement.

2. Initially, the only asset of the partnership was title to the premises at 225 Via Genoa, on Lido Isle, Newport Beach, California. That title was perfected by the findings and judgment in the quiet title action, copies of which are attached hereto as Exhibits A and B.

3. In May or June of 1989, after the hearing on the involuntary petition filed by OFF-ROAD bearing Case No. SA 88-07521-JR to have BFP adjudicated insolvent and subject to Chapter 11 of the Bankruptcy Code, in the hallway of the fifth floor of the Federal Building at Santa Ana, California, I heard the attorney for Imperial Savings say that they would not have the foreclosure sale referring to the property at 225 Via Genoa, Newport Beach, CA until after the

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THE FOLLOWING PAGE IS UNAVAILABLE FOR FILMING

DECLARATION OF SHELDON L. FOREMAN

I, SHELDON L. FOREMAN declare and state as follows:

1. As to the following facts, I know them to be true of my own personal knowledge and, if called upon to testify herein, I could and would testify competently to those facts.

2. I and my wife, Ann Fant Foreman are the beneficiaries of a promissory note in the principal amount of $200,000.00 secured by a deed of trust burdening th real property described generally as 225 Via Genoa, Newport Beach, California, which deed of trust was dated August 27, 1987 and recorded on September 16,1987 (hereinafter referred to as the "Foreman Deed of Trust") subsequent to and junior to the deed of trust in favor of Loan Market Services recorded on August 25, 1987, the trustor of which was Wayne L. Pedersen and his wife Mar-

lene M. Pedersen, which deed of trust was subsequently assigned to Imperial Savings and Loan Association (hereinafter referred to as the "First Deed of Trust").

3. The Foreman Deed of Trust was the subject of litigation in Orange County Superior Court Case No.-54 16 04, entitled B.F.P., a Partnership ...; Sheldon L. Foreman; and Ann Fant Foreman; Plaintiffs vs. Wayne L. Pedersen, Marlene M. Pedersen, et al., Defendants. Said Case was heard on July 17, 1989 in Department 91 of said Court.

4. During the course of litigation I was in frequent contact with representatives of Imperial Savings & Loan Association (hereafter "Imperial") the beneficial owner of the Firsts Deed of Trust because the trustors and their subsequent assignees had failed to make any payments to lender on said First Deed of Trust. The representatives in charge

of the loan file for Imperial changed from time to time depending on where the matter had been assigned but it was a matter of which everyone I spoke with seemed to have intimate knowledge. In all cases, up to and including my contacts in May of 1989, they were cooperative and helpful to me as a junior lienholder. I told all of the said representatives first in the loan department, then in the foreclosure department, then to their attorney about the litigation and stated that as a junior lienholder I was able to and would protect my lien on the subject property but that because of the litigation I would not do so until the last minute or until the full validity of our lien had been established.

5. During April of 1988, I was told that Imperial had to take the property to sale or be paid and I was given an additional day after the then scheduled sale

date as a junior lienholder to bring the loan current, pay the delinquency charges and the foreclosure costs; which I did by driving to San Diego on April 28, 1988 and delivering a cashier's check in the amount of $31,296.54 made payable to L. C. Service Corporation as I had been instructed to do.

6. At the time of hand delivering the cashier's check, I again explained i detail why it was difficult for me to keep paying Imperial until the could on our lien had been lifted, describing the litigation in detail, and received from their representative assurances of every cooperation. I asked if I could purchase their First Deed of Trust to protect my lien position and was told that Imperial might consider such a proposition at a later date.

7. During December of 1988, an involuntary petition in Bankruptcy was

filed by the successor in interest to Wayne and Marlene Pedersen as a partner in BFP, a Partnership; and Imperial, which had still received no payments on their loan except those which I had made in April, postponed their sale date thereafter from month to month.

8. I regularly contacted Imperial by telephone to find out what new sale date had been scheduled.

9. On April 3, 1989, I telephoned Imperial, and spoke first to a representative in the foreclosure department and asked again if I could acquire their Deed of Trust so I could defend my position; I advised that I had made arrangements to have a friend borrow the necessary money from his Bank and that all he needed was to obtain a copy of their lenders foreclosure guaranty for his bank. I gave them the name of the friend, Mr. Everett L. Hodges and offered

to provide them with bank representations on his financial ability to purchase the First Deed of Trust. I then spoke with Janet Davis who was assigned the file while the matter was in the Bankruptcy Court and made the same requests.

10. On May 8, 1989, I talked with the Attorney for Imperial and made the same request regarding the acquisition of Imperial's First Trust Deed and the need for a copy of the lenders foreclosure guaranty describing in full the litigation; the difficulty of my position as a disputed junior lienholder in making payments to Imperial which could be resolved if Imperial would sell their position. He said that he didn't see any problem with giving me a copy of the foreclosure guaranty and advised me that he was familiar with the attorney who represented the defendants. I specifically asked that any sale date be post-

poned to a date after the scheduled trial date of July 17,1989; stating that this would allow an opportunity for my lien to be established and then I would have the additional option of reinstating the Loan.

11. Thereafter, I was told by representatives of Imperial that as a matter of policy, I would not be provided with a copy of the lenders foreclosure guaranty which I had requested; and I was also told that Imperial had been contacted by many individuals who wanted to buy the property; it was described as "obviously a hot property".

12. In May 1989, I spoke with the Attorney for Imperial, again, expressing my concerns that any sale date be postponed beyond the trial date. I was told that no sale date had been set. We discussed a hearing in the Bankruptcy Court which was set for May 11, 1989,

which was a hearing to declare BFP, a Partnership, bankrupt, and he said he would contact me after the hearing on May 11, with regard to any sale date which was scheduled on the Imperial First Deed of Trust thereafter so that I would continue to have an opportunity to cure the default, if necessary.

13. I was unable to attend the May 11, 1989 hearing but was advised by BFP Partnership representatives that the attorney for Imperial who was present at the hearing stated that no sale would be scheduled until after the July 17, 1989 trial date and I advised BFP of the statements which had been made to me as set forth hereinabove.

14. I was told by a real estate broker who was present at the hearing with whom I discussed the matter, that her understanding of the statements which she had heard the attorney for Imperial

make were that the sale would not be scheduled until after the trial date.

15. Late Thursday, July 13, 1989, I received a call from the real estate broker who had been at the May 11, 1989 hearing who asked me of I knew anything about a sale of the subject property. She was upset because she had a cash buyer who had been trying to buy the property and was prepared to bid at any sale. Her client had been actively pursuing purchase from all the litigants in the trial which was scheduled on the title and had been shown the house by me on several occasions as I had retained possession during the litigation. This is the first notice I had received any anyone that a scheduled sale date had been set for July 12, 1989.

I declare under penalty of perjury according to the laws of the United States and the State of California that

the foregoing is true and correct.

Executed this 15th day of May 1990 at Newport Beach, California.

/s/ Sheldon L. Foreman
SHELDON L. FOREMAN

[PROOF OF SERVICE OMITTED IN PRINTING]

TRANSMITTAL LETTER dated May 30, 1990,
BAP TO DISTRICT COURT, BAP NO. CC-90-1220
United States Bankruptcy Appellate Panel
of the Ninth Circuit
U. S. Court of Appeals Federal Building
125 South Grand Ave., P. O. Box 91510
Pasadena, California 91109
FTS 961-7906
Telephone: (818) 405-7906

May 30, 1990

Leonard A. Brosan
U.S. District Court
526 Federal Building
34 Civic Center Plaza
Santa Ana, CA 99992701

Re: BAP No. CC-90-1220 BFP, a partnership
Bankruptcy No(s). SA-89-06771 JR
Adversary No(s). SA 89-0977 JR

A party to the appeal has timely filed an objection to the disposition of this matter by the Bankruptcy Appellate Panel. Consequently, this appeal is herewith

transferred to your court pursuant to Paragraph 3(b) of the Judicial Council Order Establishing the Bankruptcy Appellate Panel.

Sincerely,

Jed G. Weintraub
Panel Clerk

By: Vicky Jackson
Deputy Clerk
District Court
Bankruptcy Court
Woolsey
Sment
Caroom
Marquis

DECLARATION OF SHELDON L. FOREMAN

* * *

UNITED STATES BANKRUPTCY COURT

FOR THE CENTRAL DISTRICT OF CALIFORNIA

In re:	CASE NO. SA 89 06771 JR
BFP, a Partnership,	Adv. No. SA 89-0977 JR
Debtor.	Chapter 11
BFP, A Partnership,	DECLARATION OF SHELDON L. FOREMAN
Plaintiff,	
vs.	* * *
IMPERIAL SAVINGS & LOAN ASSOCIATION, a California corporation;	
Defendants.	

I, SHELDON L. FOREMAN declare and state as follows:

1. As to the following facts, I know them to be true of my own personal knowledge, and if called upon to testify herein, I could and would testify compe-

tently to those facts:

2. From 1974 until August 25, 1987, my wife, Ann Fant Foreman and I were the owners of the real property described generally as 225 Via Genoa, Newport Beach, California (hereinafter referred to as the "Subject Property").

3. In late November 1986, Frank E. Barton offered to purchase the Subject Property by putting together a partnership composed of his son, Russell J. Barton and Donald W. Deitz or some other business acquaintance. I was told at that time by Frank E. Barton that he and Russell J. Barton would both contribute their services for remodeling the Subject Property and thereafter market the Subject Property at an increased price sharing the profits from sale with Mr. Deitz, who would lend his financial strength as his investment to the partnership. Frank E. Barton acted as agent

for the partnership, with the consent and approval of both Russell J. Barton and Donald W. Deitz which consent was expressed to me on several occasions by Russell J. Barton and on at least one occasion by Mr. Deitz.

4. An escrow for the sale of the Subject Property was opened at Cress Escrow as No. 784587-TW and escrow instructions dated March 6, 1987 were signed by us with Donald W. Deitz (hereafter referred to as Deitz) named as Buyer.

5. In May or early June of 1987, Frank DE. Barton told me that Deitz was not able to qualify for their intended loan and requested that we consent to the substitution of Wayne L. Pedersen, as named Buyer in the same escrow instead of Donald W. Deitz.

6. I was told by Frank E. Barton in the presence of Russell J. Barton and

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the substitution of Wayne L. Pedersen into the escrow as Buyer, which superseding escrow instructions were dated August 3, 1987.

9. Just prior to the close of escrow, Randy Jones, on behalf of Wayne L. Pedersen, asked that the escrow be amended to include the name of his wife, Marlene M. Pedersen, and on or about August 19, 1987, Randy Jones and Frank E. Barton agreed in my presence that the terms of the partnership would be immediately reduced to writing and would include Marlene Pedersen; be dated August 26, 1987; be entitled B.F.P., a General partnership; and that the promissory note of the partnership would be issued to my wife and myself in the amount of $200,000 (the agreed amount of the loan which we were making available to the partnership) secured by a deed of trust recorded as a lien against the Subject Property, junior

only to the deed of trust in favor of Loan Market Services. Said promissory note and deed of trust were dated August 26, 1987, and the deed of trust was recorded on September 16, 1987 (hereinafter referred to as the "Foreman Deed of Trust).

10. Frank E. Barton told me that the Partnership Agreement was signed by Russell J. Barton prior to August 25, 1987, the escrow closing date, and delivered to the Pedersens by Randy Jones for signature.

11. The Deed from Wayne L. Pedersen and his wife to the partnership was prepared by the Escrow company, dated August 26, 1987, but approved by us prior to August 25, 1987 at the escrow office.

12. On or about September 29,1987, Pedersen conveyed the Subject Property to Off-Road Vehicles Recreation & Family Campground, Inc. (hereinafter "Off-Road")

claiming that the Foreman Deed of Trust was void and that Pedersen and not the partnership was the owner of the Subject Property.

13. On or about October 27, 1987, Frank and Russell Barton for the Partnership agreed to file a Complaint against Pedersen and Off-Road and to pursue litigation to validate the Foreman Deed of Trust; and to make us whole as to any damages which we incurred resulting from the actions of Pedersen and Off-Road. We agreed that the Partnership should retain its interest in the Subject Property and signed a letter waiving any conflicts of interest in order that attorney Roy B. Woolsey might represent the partnership and my wife and myself in the litigation.

14. The Foreman Deed of Trust was the subject of litigation in Orange County Superior Court Case No. 54 16 04, entitled B.F.P., a Partnership, . . .

Sheldon L. Foreman and Ann Fant Foreman, Plaintiffs vs. Wayne L. Pedersen, Marlene M. Pedersen, et al., Defendants. Said case was heard on July 17, 1989, in Department 91 of said Court and resulted in Judgment for the Plaintiffs.

15. I was in possession of the Subject Property at all times through and including the date of trial and until the locks were changed without my consent by the purchasers at foreclosure sale on the First Deed of Trust. I continued to show the property for the Partnership to the many interested buyers who were making offers to the Partnership in excess of $625,000 in cash; one of these was the person who purchased the property for $660,000.00 from the purchasers at the foreclosure sale.

I swear under penalty of perjury under the laws of the United States and the State of California that the forego-

ing is true and correct.

Executed this 7th day of June, 1990 in Newport Beach, California.

/s/ Sheldon L. Foreman

STATEMENT CONCERNING MINUTES OF COURT FOR JUNE 18, 1990

The minutes of court are not in the court file and we have been unable to locate the same. We verily believe that the abbreviated entry which appears in the docket entries hereinabove in this Appendix accurately reflects a statement contained in the minutes.

* * *

UNITED STATES BANKRUPTCY COURT

CENTRAL DISTRICT OF CALIFORNIA

In re BFP, a Partnership, Debtor.	Bk. No. SA 89-06771 JR Adv. No. SA 89-0977 JR Chapter 11
BFP, a Partnership, Plaintiff, vs. IMPERIAL SAVINGS & LOAN ASSOCIATION, a California corporation; Defendant.	ORDER GRANTING SUMMARY JUDGMENT TO DEFENDANT IMPERIAL SAVINGS Continued Hearing -- Date: June 18, 1990 Time: 3:30 p.m. Place: U.S. Bankruptcy Court 34 Civic Center Plaza Santa Ana, CA Courtroom 520

Movant's Motion for Summary Judgment came on regularly for hearing on June 18,1990, at 3:30 p.m., before the Honorable John Ryan. Movant/Defendant IMPERIAL SAVINGS & LOAN ASSOCIATION appeared by and through its counsel of record, Mary C. Caroom, Esq., of the Law Offices of Edward G. Schloss. Debtor BFP, a

Partnership appeared through its counsel, Roy Woolsey, Esq.

The Court, having heard the arguments presented, the Court records and files, the Findings of Fact and Conclusions of Law filed concurrently herewith, and with good cause appearing therefor, makes its Order as follows:

IT IS HEREBY ORDERED, ADJUDGED AND DECREED that Movant/Defendant IMPERIAL SAVINGS & LOAN ASSOCIATION's Motion for Judgment on the Pleadings and/or for Summary Judgment is GRANTED.

DATED: 10 JUL 1990

/s/ JOHN E. RYAN
UNITED STATES BANKRUPTCY JUDGE

[NO PROOF OF SERVICE ATTACHED]

ORDER GRANTING CERTIORARI

SUPREME COURT OF THE UNITED STATES

No. 92-1370

BFP, Petitioner

v.

Resolution Trust Corporation,

as Receiver of

Imperial Federal Savings Association, et al.

ORDER GRANTING CERTIORARI.

Filed May 24, 1993.

The petition herein for a writ of certiorari to the United States Court of Appeals for the Ninth Circuit is granted.

May 24, 1993